This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

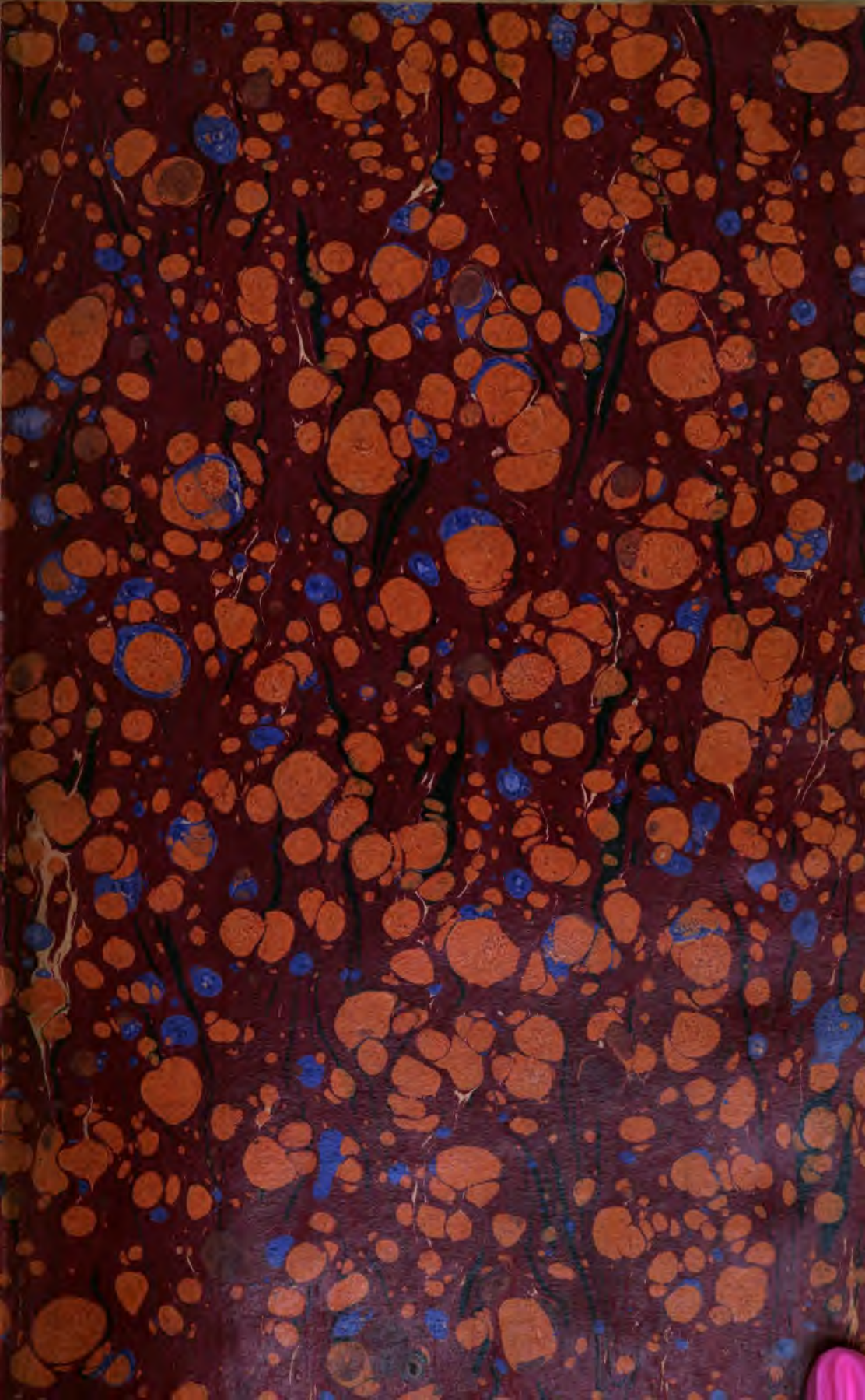
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HDI
HL 2TRT $

STR. S

HARVARD LAW LIBRARY

Received MAR 17 1910



Cases

HEARD AND DETERMINED

IN

HER MAJESTY'S SUPREME COURT

OF THE

Straits Settlements.

Supreme Court

1808—1884.

EDITED AND REPORTED

[WITH A JUDICIAL-HISTORICAL PREFACE FROM 1786 TO 1885.]

BY

JAMES WILLIAM NORTON KYSHE, Esq.,

ACTING REGISTRAR OF THE SAID COURT IN MALACCA.

Law is beneficence acting by rule.
Burke.

IN THREE VOLUMES.

VOL. III.

MAGISTRATES' APPEALS.

Copyright.

MA/ST
503
K

SINGAPORE:
PRINTED AT THE "SINGAPORE AND STRAITS PRINTING OFFICE."

1886.

MAR 17 1910

TO

HIS HONOR

SIR THOMAS SIDGREAVES, KNT.,

Late Chief-Justice of the Straits Settlements, &c., &c., &c.

This Work

IS, WITH PERMISSION,

RESPECTFULLY DEDICATED

BY

THE AUTHOR.

PREFACE

TO

THE THIRD VOLUME.

THIS work was only undertaken in consequence of the want generally expressed, of a complete report of all the important decisions in our Courts, which might be precedents for future cases. The magnitude of the task, I readily confess, made me charge myself with presumption for venturing on so bold an enterprise. The work however is now completed.

Since my transfer to Malacca, I have gone over all the books and records of the Court in the Settlement, with the result that, as fully expected, I have ascertained that only a few important cases have arisen in Malacca. Within recent years several important ones which originally arose here, have been transferred to Singapore for determination or decision. Those of any importance will be found embodied throughout this work.

Of the Singapore cases, I am not, I regret to say, in a position to speak so favourably as of those of Penang and Malacca, and that for obvious reasons; but I may add, that I have the assurance of many able to judge of such a matter, [apart from the fact that the business of the Court in Penang has always been heavier than in Singapore], that all the important cases decided in the latter Settlement within the last few years, and wherein written Judgments have been delivered, have appeared in the public press. Those cases, I need hardly say, I have not omitted to include in this work, and apart from these, several have been reported which, with the usual kindness evinced towards me throughout this work by their Honors the Judges and members of the bar, were placed by them at my disposal.

In conclusion I beg respectfully to express my grateful acknowledgments to the present Chief Justice for his kindness in revising such of his cases as are reported in this Volume.

The magnitude and scope of this work will be a plea for indulgent consideration of all its shortcomings.

J. W. N. K.

MALACCA, S. S.
2nd August, 1886.

JUDGES

OF

THE SUPREME COURT.

His Honor THEODORE THOMAS FORD, Chief Justice of the Straits Settlements.*

His Honor THOMAS LETT WOOD.

His Honor WILLAM ANTHONY MUSGRAVE SHERIFF.

His Honor ETIENNE PELLEREAU.

ATTORNEY-GENERAL.

The Hon. JOHN WINFIELD BONSER.

SOLICITOR-GENERAL.

DANIEL LOGAN, ESQ.

* *Vice* His Honor *Sir Thomas Sidgreaves, Knt.*, retired, February, 1886.

CORRIGENDA.

PAGE.	
14.	Line 17; Reg. *v.* Meera Lebby—for "1859" *read* "1857."
16.	„ 11; Reg. *v.* Willans—for "Willians" *read* "Willans."
61.	„ 13; Ho Ghee Siew & anor. *v.* Nacodah Mahomed—for "Vatteld" *read* "Vattel."
144.	Marginal note—Reg. *v.* Lim A Si & anor.—for "Ford, J." *read* "Wood, J."
211.	Line 1; *dele* "Ordinances—*continued.*"

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

PAGE.

A.

Abass and anor., Reg. *v.* - 184
Abbass *v.* Tomby - - - 131
Abdul Gunny *v.* Newland - 102
Abdulrahman and ors., Reg. *v.* - 61
Ah Chin, Mun. Comers. *v.* - 85
Arnashellam Patten, Dorehsawmy Pillay *v.* - - 105
Aw Eng Tho, Reg. *v.* - - 171
Ayah Doreh Pillay, Mootoo and ors., *v.* - - - 90

B.

Beh Hooie and anor., Reg. *v.* - 103
Boey Ah Sam *v.* Seow Ah Seong 161

C.

Cartan *v.* Meenachee - - 151
Cassim, Chooashary and anor. *v.* 98
——— *v.* Haji Mahomed Syed 101
Cheng Hee, Reg. *v.* - - 89

PAGE.

Chi Yuen, *In re* - - - 176
Chooashary and anor. *v.* Cassim - - - - - 98
Choo Chye Hok, Hass *v.* - 152
Chuah Seng and ors., Mun. Comers. *v.* - - - - 140
Connor *v.* Tan Jim Sin - - 114

D.

D'Oliveiro, Reg. *v.* - - 45
Dorehsawmy Pillay *v.* Arnashellam Patten - - 105
Dragon, Tuan Puteh *v.* - - 87

E.

East India Co., Edwards *v.* - 6
Ebram Khan, Mahomed Aniff *v.* 88
Edwards *v.* East India Co. - 6

F.

Fong Ah Chan *v.* Kah Sew - 109

PAGE.

G.

Gan Kim Swee *v.* Newland - 108
Gaudart, Warn *v.* - - 1
Goh Choo, Reg. *v.* - - 106

H.

Haji Mahomed Syed, Cassim *v.* 101
—— Sahid *v.* Shaik Peroo - 79
Hass *v.* Choo Chye Hok - 152
Him, Punghulu Allang *v.* - 144
Ho Fuk Weng and ors., Kader Khan *v.* - - - 182
— Ghee Siew and anor. *v.* Nacodah Mahomed - - 51

K.

Kader Khan *v.* Ho Fuk Weng and ors. - - - - - 182
Kadier and anor., Velloo Pullay *v.* 50
Kah Sew, Fong Ah Chan *v.* 109
Kattan and ors., Lamb *v.* - 71
Kelly and anor., Reg. *v.* - 194
Khoo Aing Hong *v.* Meyapah Chetty - - - - 124
—— —— ——Puteh *v.* - 124
Khoo See Hee and ors., Reg. *v.* 170
——Sim Choon, —— *v.* 97
——Tean Tek *v.* Opium Farmer 107
Koh Boo An *v.* Tioh Jee - - 164
Komorapah Chetty, Mahomed Sham *v.* - - - - - 186
Koomah, Reg. *v.* - - 67
Kuck Sin Loi, ——*v.* - - 110
Kweh Te Hin, ——*v.* - - 158
Kyamboo, Secunder *v.* - - 116

L.

Lamb *v.* Kattan and ors. - - 71
———*v.* Ponen - - - 62
Lee Hong Kang and ors., Reg. *v.* 145
Leong Wee Quan, Ong Cheh Yew *v.* - - - - - 104

PAGE.

Letchmee and anor. *v.* Ramasawmy - - - - - 102
Lim A Si and anor., Reg. *v.* - 143
—— Beh and ors. *v.* Opium Farmer - - - - - 10
—— Chow Leng *v.* Opium Farmer - - - - - 136
—— Peng and ors., Reg. *v.* - 84
Low Chu *v.* Opium Farmer - 156

M.

Mahomed, Mymoona *v.* - - 10
———— Merican and ors., *v.* 138
———— Aniff *v.* Ebram Khan 88
———— Haniff, Versay *v.* - 79
———— Lebbye, Mamsah *v.* 130
———— Oosman and anor., Reg. *v.* - - - - - 50
———— Sham *v.* Komorapah Chetty - - - - - 186
Mamsah *v.* Mahomed Lebbye 130
Man and anor. *v.* Samsah - 99
Mariapen, Narainasawmy *v.* - 120
Mas Etah, Mat Issah *v.* - - 134
Mat Issah *v.* Mas Etah - - 134
——Salleh *v.* Sarah - - 167
Meenachee, Cartan *v.* - - 151
Meera Lebbye, Reg. *v.* - - 13
Merican and ors., *v.* Mahomed 138
Meyapah Chetty, Khoo Aing Hong *v.* - - - - - 124
Mootoo and ors., *v.* Ayah Doreh Pillay - - - - - 90
Municipal Commissioners *v.* Ah Chin - - - - - - 85
———— ———— *v.* Chuah Seng and ors. - - - 140
Mustan and ors., Towers *v.* - 92
Mymoona *v.* Mahomed - - 10

N.

Nacodah Mahomed, Ho Ghee Siew and anor. *v.* - - 51
Narainasawmy *v.* Mariapen - 120

PAGE.

Nawas and anor. *v.* Shaik Rajah Alli - - - - - - 118
Newland, Abdul Gunny *v.* - 102
——— Gan Kim Swee *v.* - 108

O.

Oh Kan *v.* Tan Chuan - 126
— —— *v.* Wee Lalah - 126
Ong Ah Huat *v.* Opium Farmer 100
—— Cheh Yew *v.* Leong Wee Quan - - - - - - 104
—— Hong Jiow *v.* Teh Tan Kiat - - - - - - 189
Ooi Tim and ors., Reg. *v.* - 119
Opium Farmer, Khoo Tean Tek *v.* - - - - - - 107
——— ——— Lim Beh and ors. *v.* - - - - - 10
——— ——— Lim Chow Leng *v.* - - - - - 136
——— ——— Low Chu *v.* - 156
——— ——— Ong Ah Huat *v.* 100
——— ——— Tek Wee *v.* - 132
——— ——— Tan Sim Tee *v.* - 174

P.

Pawnbroker *v.* Ramsawmy Padiachee - - - - - 148
Ponen and ors., Lamb *v.* - 62
Punghulu Allang *v.* Him - 144
Puteh *v.* Khoo Aing Hong - 124

R.

Ramasawmy, Letchmee and anor. *v.* - - - - - 102
Ramasawmy Padiachee, Pawnbroker *v.* - - - - - 148
Reg. *v.* Abass and anor. - - 184
—— *v.* Abdulrahman and ors. 61
—— *v.* Aw Eng Tho - - 171
—— *v.* Beh Hooie and anor. - 103

PAGE.

Reg. *v.* Cheng Hee - - 89
—— *v.* D'Oliveiro - - 45
—— *v.* Goh Choo - - 106
—— *v.* Kelly and anor. - - 194
—— *v.* Khoo See Hee and ors. 170
—— *v.* —— Sim Choon - - 97
—— *v.* Koomah - - 67
—— *v.* Kuck Sin Loi - - 110
—— *v.* Kweh Te Hin - - 158
—— *v.* Lee Hong Kang and ors. 145
—— *v.* Lim A Si and anor. - 143
—— *v.* —— Peng and ors. - 84
—— *v.* Mahomed Oosman and anor. - - - - - 50
—— *v.* Meera Lebby - - 13
—— *v.* Ooi Tim and ors. - - 119
—— *v.* Shaik Ishmael Lebby - 99
—— *v.* Shavoo - - - 116
—— *v.* Sheik Hossain and ors. 98
—— *v.* Tan A Yeap —— —— 104
—— *v.* —— Ah Fook - - 43
—— *v.* —— Poh Keah - - 154
—— *v.* —— Sim Ho - - 448
—— *v.* —— Sin Hap and anor. 94
—— *v.* Willans - . 16

S.

Samsah, Man and anor. *v.* - 199
Sarah, Mat Salleh *v.* - - 167
Secunder *v.* Kyamboo - - 116
Seow Ah Seong, Boey Ah Sam *v.* - - - - - 161
Shaik Ishmael Lebby, Reg. *v.* - 99
—— Peroo, Haji Sahid *v.* - 79
—— Rajah Alli, Nawas and anor. *v.* - - - - - 118
Sheik Hossain and ors., Reg. *v.* 98
Shavoo, —— *v.* 116

T.

Tan Ah Fook Reg. *v.* - 43
——— — Yeap and ors., —— *v.* - 104
Tan Chuan, Oh Kan *v.* - - 126
—— Jim Sin, Connor *v.* - - 114

	PAGE.
Tan Poh Keah, Reg. *v.* - -	154
—— Sim Ho, —— *v.* .- -	148
—— —— Tee *v.* Opium Farmer	174
—— Sin Hap and anor., Reg. *v.*	94
Teh Tan Kiat, Ong Hong Jiow *v.* - - - -	189
Tek Wee *v.* Opium Farmer -	132
Thaivoo, Veramah *v.* - -	117
Tioh Jee, Koh Boo An *v.* -	164
Tomby, Abbass *v.* - - -	131
Towers *v.* Mustan and ors. -	92
Tuan Puteh *v.* Dragon - -	87

V.

Vanjoor Mustan, *In re* - -	122
Velloo Pullay *v.* Kadier and anor. - - - - . -	50
Veramah *v.* Thaivoo - -	117
Versay *v.* Mahomed Haniff -	79

W.

Warn *v.* Gaudart - - -	1
Wee Lalah *v.* Oh Kan - -	126
Willans, Reg. *v.* - - -	16

TABLE OF CASES CITED.

A.

		Page.
Abdullah, In the goods of	Morton [Ind.] Rep. 19	19, 29
Attorney-General *v.* Norstedt	3 Price's Rep. 97	179
——— *v.* Pearson	3 Mer. 400	34
——— *v.* Stewart	2 Mer. 143, 162	38
——— *v.* Wilson	9 Cl. & F. 355	34

B.

Baily *v.* Haines	19 L. J. Q. B. [N. S.] 73	79
Baker, Ex-parte	26 L. J. M. C. 155, s.c. 7 E. & B. 697, s.c. 2 H. & N. 219	41, 190, 193
Bamford *v.* Turnley	31 L. J. Q. B. [N. S.] 286	85
Bows *v.* Fenwick	9 L. R. C. P. 339	67, 68, 70
Brown *v* Cole	14 Sim. 427, s.c. 14 L. J. [N. S.] Ch. 167	188
Burmese *v.* Regina	7 Moo. Ind. App. 72	55

C.

Calvin's Case	7 Rep. 10, 17*b*	21, 22
Campbell *v.* Hall	1 Cowp. 204, 212	21, 25
Case *v.* Storey	4 L. R. Ex. 319	68
Castro *v.* Regina	6 L. R. App. Cases, 229	183
Clark *v.* Askew	8 East, 28	4
Clarke *v.* Hague	29 L. J. M. C. 105	68
Cowper *v.* Cowper	2 P. Wms. 753	28

D.

Dalrymple *v.* Dalrymple	2 Hagg. Consist. 59	32
Dalton *v.* McIntyre	1 Dowl. [N. S.] 76	121
Day *v.* Day	31 Beav. 270, s.c. 31 L. J. Ch. [N. S.] 806	188
Doe d. Birthwhistle *v.* Vardill	5 B. & C. 438, 2 Cl. & F. 517, 7 Cl. & F. 895	34
Doggett *v.* Catterns	34 L. J. [N. S.] C. P. 46, 159	67, 70

E.

Eastwood *v.* Miller	9 L. R. Q. B. 440	68, 70

Elkin *v.* Janson	13 M. & W. 655	125
Enayet Hoossein. *In re*	11 W. R. Cr. 1	87

F.

Fletcher *v.* Calthrop	6 Q. B. 880	44
Freeman *v.* Fairlie	3 Meriv. 24	19

G.

Ganer *v.* Lady Lanesborough	Peake, 18	33
Giblin *v.* McMullen	2 L. R. P. C. 317	363
Gokul Chund *v.* Shith Roshun Lal	2 N.W.P.H. Ct. Rep. 82	168

I.

Iswar Chandra Kurmaker *v.* Sital Dass Mitter	8 Beng. L. R. App. 62	168

J.

Jacobs *v.* Tarleton	11 Q. B. 421	79

K.

Keighley *v.* Bell	4 Fos. & Fin. 763	57
Khu Poh *v.* Wan Mat	Straits L. R. 247	55
Koonjobeharry Lall *v.* Rajah Doomney	11 W. R. Cr. 29	73

L.

Lim Chye Peow *v.* Wee Boon Tek	Straits L. R. 282	127
Lal Chand Roy, *In re*	9 W. R. C. R. 37	79, 80

M.

Marriott *v.* Hampton	2 Sm. L. C. 356 [5th ed.]	188
Mayor of Lyons *v.* East India Co.	2 Moo. P. C. 172	38
Mount *v.* Selwood	1 Q. B. 726	88
Mure *v.* Kaye	4 Taunt. 34	53, 54, 57, 60

N.

Newman *v.* Bendyshe	10 A. & E. 11	119, 151
——— *v.* Hardwicke	8 A. & E. 124	119
Nrigendro Lall Chatterjee *v.* Okhoy Coomar Shaw	21 W. R. Cr. 59	84

O.

Omichund *v.* Barker	1 Sm. L. C. 381	31
Opium Farmer *v.* Koh Boo An	Straits L. R. 278	119

P.

Peate *v.* Dicken	1 C. M. & R. 22	48
Pedgrift *v.* Chevallier	29 L. J. M. C. 225	125
Peerless, *Re*	1 Q. B. 143	153
Pertreis *v.* Tondear	1 Hagg. 139	132
Pitts *v.* Millar	9 L. R. Q. B. 380	68
Proctor *v.* Manwaring	3 B. & Ald. 145	150

R.

Regina *v.* Abdool	10 W. R. Cr. 23	87
——— *v.* Anderson	1 L. R. C. C. R. 161	153
——— *v.* Bernard	1 F. & F. 240	54, 55
——— *v.* Bertrand	1 L. R. P. C. 520	183
——— *v.* Bjosson	34 L. J. M. C. 180	55, 152
——— *v.* Castro	6 L. R. App. C. 229	183
——— *v.* Chotey Lal	2 N. W. P. H. Ct. R. 271	98
——— *v.* Eaton	2 T. R. 472	121
——— *v.* Edwards	1 East 278	153
——— *v.* Enayet Hossein	5 W. R. Cr. 43	87
——— *v.* Evans	9 Cox. C. C. 238, s.c. 32, L. J. M. C. 38	80
——— *v.* Fuidge	33 L. J. M. C. 74	79, 98, 130
——— *v.* Gaub Gorah Cacharee	8 W. R. Cr. 6	71
——— *v.* Girdhar Dharamdas	6 Bom. H. C. Rep. Cr.	87
——— *v.* Guttridge	9 C. & P. 471	51
——— *v.* Hanson	[unreported] see Paley on Con. 123	105
——— *v.* Hilditch	5 C. & P. 299	79
——— *v.* Inhabitants of Hellingley	28 L. J. M. C. 167	132
——— *v.* Jenut Bebee	1 W. R. Cr. 46	168
——— *v.* Keyn	2 L. R. Ex. Div. 63	153
——— *v.* Lewis	26 L. J. M. C. 104	55, 152
——— *v.* Martin	8 A. & E. 481	117
——— *v.* Mentham	Oke's Mag. Sy. 223, note 23	121
——— *v.* Pearson	5 L. R. Q. B. 237	168
——— *v.* Pelfryman	2 Leach's C. C. 563	51
——— *v.* Ram Dyal Mundle	7 W. R. Cr. 28	168
——— *v.* Ramtohul Singh	5 W. R. Cr. 12	99
——— *v.* Shaw	34 L. J. M. C.	55
——— *v.* Sheik Bazu	8 W. R. C. R. 47	62
——— *v.* Sill	17 Jur. [O. S.] 22, s.c. 21 L. J. M. C. 214, Dears. C. C. 10	117, 135
——— *v.* Surroop Chundra Paul	12 W. R. C. R. 85	62
——— *v.* Surwan Singh	11 W. R. Cr. 11	168
——— *v.* Thapoo	20 W. R. C. R. 37	101
——— *v.* Turner	5 M. & S. 206	105
——— *v.* Walton	32 L. J. M. C. 79	117
——— *v.* Willans	1 Mad. H. C. 31	117
——— *v.* Brampton	10 East 282, 288	20
Rex *v.* Buckinghamshire Justices	7 D. & R. 689, 1 B. & C. 485, s.c. 3 Nev. & M. 68	53
—— *v.* Cross	3 Camp. 224	85
—— *v.* Kimberley	2 Str. 848	53, 59
—— *v.* Little	1 Burr. 610	142, 149, 150
—— *v.* Roderip	7 D & R. 861, 5 B. & C. 239	53
—— *v.* Turner	5 M. & Sel. 206	125
—— *v.* Ward	7 Cox C. C. 421	135
—— *v.* White	1 Burr. 333	85
—— *v.* Woallen Park	2 Hale P. C. 71	54
Rodyk *v.* Williamson	[Malacca case—not reported]	36

S.

Sandiman *v.* Breach	7 B. & C. 96	48
Score *v.* The Lord Admiral	Parker, 273	179
Shaw *v.* Morley	3 L. R. Ex. 137	67, 70
Shristadhar Parol *v.* Indrobhosun Chukerbutty	11 W. R. Cr. 25	168

T.

Tara Duss Bhuttacharje *v.* Bhaloo Sheik	8 W. R. Cr. 69	71, 73

W.

Warrender *v.* Warrender	9 Bligh [N. S.] 89, s.c. 2 C. & F. 488	33, 57
Watson *v.* Martin	34 L. J. M. C. 50	145, 147
Webster *v.* Mason	8 Dowl. 705	52

CASES

HEARD AND DETERMINED

IN

HER MAJESTY'S SUPREME COURT

OF THE

STRAITS SETTLEMENTS,

1808—1884.

VOLUME III.

[MAGISTRATES' APPEALS.]

WARN *v.* GAUDART.

PENANG.

MALKIN, R.
1834.

April 21.

The Court of Requests has jurisdiction to adjudicate on a case, where the debt originally exceeded the limited amount, but has been reduced below it, by part-payment,—the Statute of Limitations,—or the infancy of the contractor: and the reason for this is, because these defences go to the root of the claim and operate to the disaffirmance of the debt, and although a larger sum may become the subject of enquiry, yet the whole *existing debt*, is within the necessary amount.

Such original debt, however, to which there is only a partial defence as a set-off or tender, is not within its jurisdiction, as it is optional with a defendant whether he will avail himself of the defence or not, and until he does so, there is *no existing debt* within the necessary amount.

The general principle for deciding whether a defence is to be taken as part-payment or set-off is, to ascertain whether, by the course of dealing between the parties, the items of their respective accounts are to be set against each other, and any monies or the value of goods received by the one are to be treated as made in liquidation of the other's account—or whether no such course of dealing exists, and the transactions are substantially unconnected and distinct. In the former case, the dealings will operate as a part-payment, and any balance on the account, under the limited amount, will be within the jurisdiction of the Court of Requests —in the latter they will be mere matter of set-off, optional to the defendant, and will not be within such jurisdiction.

The clause in the Charter of 1826, relating to the "debt, duty or matter in dispute" triable before a Court of Requests, must be read *riddendo singula singulis*: and the words "matter in dispute" mean, the thing claimed and denied, and not anything which may come incidentally in question, and has not the same meaning as the previous word "debt." The word "debt," applies to cases where there is a definite sum due, within the limited amount, and the words "duty or matter in dispute," to the unspecified class of other suits and causes of small amount, to which the power of the Court also extends.

This was an application in the nature of an appeal, from the decision of Mr. Wright, the Commissioner of the Court of

MALKIN, R. 1834. WARN v. GAUDART.

Requests, Penang: the matters giving rise to it, and the questions raised therein, sufficiently appear in the judgment.

Caunter for the appellant [plaintiff.]

Respondent [defendant] in person.

Cur. Adv. Vult.

April 28. *Malkin*, R. This was an application arising out of an action in the Court of Commissioners for the recovery of small debts, in which the Commissioner had non-suited the plaintiff, considering the subject matter of the action to exceed the limitation of the authority of that Court. The action is represented to have been for a balance of account, the sum sought to be recovered being within the authority of the Court, but being the balance of an account of greater extent, and in which some of the items individually exceed the limited sum. There appears to have been no regular statement and adjustment of an account, so as to furnish a completely new cause of action *on an account stated*, in which case, no doubt seems to have been entertained that the power of the Court would apply; but it is said on the part of the complainant, that he could have produced evidence to show some acknowledgment of a balance, and that evidence was not received.

If it were necessary to examine minutely into what took place on the hearing, more information would undoubtedly be required, and a more regular manner of proceeding ought to be adopted, before this Court can make any binding order upon the Commissioner of the Court below; but as it appears obviously, that the only proper course of proceeding—if the Commissioner made no error in adjudicating on the case, but had merely refused to hear it on a mistaken notion that he was not empowered to do so,—would be to remit it to him for hearing, the most convenient course for me to adopt will be to express my opinion as to the jurisdiction of the Inferior Court, and that the case should be taken back there, by the consent of the parties, if on hearing that opinion, the plaintiff should think it desirable to do so. It will be seen by my giving the plaintiff that power of choice, that I think he is, at all events, entitled to some further investigation; but it will be a question for him, whether he will desire it, because it is possible that upon investigation, the Commissioner might finally come to his original conclusion that the case is beyond his authority. Whether he ought to do so or not, depends entirely on circumstances with respect to which, I am completely uninformed.

The general question involved in the case, is one of great importance, as it affects the general practice of the Inferior Court, and it is undoubtedly one of much difficulty, as similar questions have very frequently come before the Courts in England, and have occasioned a series of very inconsistent and conflicting decisions. The Court of Requests Acts in England, generally contain provisions mulcting parties in costs who bring actions in the Superior Courts, which might and ought to have been brought in those of lower jurisdiction; and except in a particular and very

questionable class of cases, where the Judges have claimed a discretionary power of refusing to give or take away costs, in cases which, in the result, might have been tried in the Inferior Court, but the plaintiffs did not appear to have acted vexatiously in choosing to proceed in the Superior. The decisions as to liability to costs, are substantially decisions on the jurisdiction of the Inferior Courts. In the Court of King's Bench, those decisions have been generally in favour of that jurisdiction, in the Court of Common Pleas against it. I am not aware of any in the Court of Exchequer. In such a conflict of authority, it is of course necessary to examine into the principles on which the decisions are founded, although, if the questions were to depend on authority merely, I should say that, with reference to the particular times at which those questions were decided, and to certain inaccuracies of argument which, without entering into any minute detail, impeach the authority of some of the Common Pleas cases, I should consider the authority of those decided in the King's Bench as more binding.

The general principle on which the King's Bench seems to have acted is this,—that the object of the institution of those Inferior Courts is to give a cheap and easy remedy for all claims of trivial amount, except in certain cases where, by the express provisions of the Statutes, claims which might have a material collateral operation as furnishing evidence of the title to land, &c., are excepted from their power. Difficult and perplexing questions may arise in matters of small as well as large amount, and the principle of all such Courts is, to run the risk of a less correct judgment for the sake of having an earlier and cheaper decision, in cases where, from the trivial nature of the claim, a tedious and expensive process, is a greater evil than the danger of a less accurate result. This argument evidently applies to difficult as well as to easy questions: the greater indeed the difficulty of a particular class of investigations, the greater is the evil of submitting them to a less skilful tribunal, but it is a question only of degree, and does not affect the nature of the argument, though it might, in certain instances, produce a different opinion as to the balance of inconvenience.

The Court of Common Pleas seems to have been principally impressed with the inconvenience of allowing claims not originally the subject of the jurisdiction of the Court of Requests, to become so, at least to the extent of enquiring into them collaterally; and Eyre, C. J. in particular says, it would be allowing them to examine into the most intricate questions of mercantile accounts. In certain cases it might; but still the question recurs, if the whole claim in existence at the time of the litigation is within the limited amount, is not the party entitled to just as cheap and summary a remedy in those cases as in any other? The advantage is as great, and the mischief of a wrong decision is no greater.

It seems to me, that these arguments of inconvenience do not furnish any sufficient answer to the reasoning of the other side, or to the words of the Statutes, Charters, &c., which empower the

MALKIN, R. 1834.

WARN v. GAUDART.

different Courts in question; and an examination of the different cases which have been decided, [without any question arising,] seems strongly to confirm the doctrine that whenever the whole claim in existence at the time of the action brought is within the limited amount, the Inferior Courts have jurisdiction. Without entering into detail, it has been decided in cases quite independent of the phraseology of particular Statutes, that a debt originally exceeding the amount, but reduced below it by part-payment,—by the circumstance that part of it has been barred by the operation of the Statute of Limitations—or by the infancy of the Contractor,—is within the authority of the Court of Requests. And why? Because although a larger sum may become the matter of enquiry, the whole existing *debt* is within the necessary amount. On the other hand, a debt to which a partial defence exists by reason of set-off or tender, is not within the authority of the Courts. The principle of this distinction in cases of set-off is so clearly explained by Sir Vicary Gibbs, Attorney-General, in *Clark* v. *Askew*, 8 East 28, that I will only read his argument, and refer further to the circumstance that it required a Statute to admit set-off as a defence at all. He says:

> "Where the plaintiff's demand is reduced below 40*s.* by means of a "set-off arising from a different account, the plaintiff's debt is still above "40*s.*, and till plea pleaded, it is uncertain whether the defendant will avail "himself of his set-off: and if the plaintiff only brought his action for the "balance, the defendant not availing himself of his set-off, the plaintiff "would be concluded. But here the plaintiff's *debt* was reduced below 40*s.*, "by actual *payments* on account, before the action brought."

The case of tender is equally clear of explanation, for the plea of tender admits, instead of denying the debt; the money tendered must be brought into Court, and is taken out under the authority of the judgment, and the whole proceeding goes merely on the principle of preventing vexation on the part of the plaintiff, not on the disaffirmance of the debt.

On the whole therefore, I think that whenever there is no *debt* beyond the limited sum, the Commissioner ought to entertain the case; and this will practically be the same question as whether in this Court, according to our rules of pleading, any plea of tender, set-off, &c., would be required in any particular case. This question would sometimes be a difficult one, for the distinction between matters of account and payment, and matters of set-off, often requires much nicety of application to the facts of a case.

The general principle however is clear; whenever by the course of dealing between the parties, the items of their respective accounts are to be set against each other, and any monies received, or the value of any goods disposed, are to be treated as payment or liquidation of any counter-claim, then it is account and not set-off; the balance of the account is the whole debt existing, and no more could be recovered in any Court except by the negligence of the defendant, and the Inferior Court has therefore jurisdiction. When, on the other hand, no such course of deal-

ing exists, but the transactions are substantially unconnected, then although the defendant has the privilege of using his counter-claim as a matter of defence, it is at his option to do so or to refuse it; the debt therefore is the whole amount ever due to the plaintiff, although he may be unable to recover it all, if the defendant objects in a proper manner, and it is therefore the province of the Superior Court only, to entertain the case.

It remains to enquire whether there is anything in the establishment of the Court of Requests here, to render those general principles inapplicable to it, and it seems to me that there is not. The Charter empowers, and the Proclamation effects, the erection of a Court for the recovery of debts, and the trial and determination of Suits, whenever the "debt, duty or matter in dispute" shall not exceed the value of thirty-two dollars. The only argument that can be raised out of this is, that on the construction I have given to the authority of these Courts, matters of more than thirty-two dollars value might be in dispute, and the subject of examination, though the whole recovery was within the amount. I do not however think this argument available, and this for two reasons—I have no doubt that "matter in dispute" means the thing claimed and denied, and not anything which may come incidentally in question, and I am of opinion also that the phrase "matter in dispute" has no resemblance at all to the "*debts*" which come in question, but applies only to the unspecified class of cases of small amount, to which the power of the Court extends. The clause is to be read *riddendo singula singulis*, a Court with full jurisdiction for the recovery of debts where the debt shall not exceed the value of thirty-two dollars,—and for the trial of *other* suits and causes [*a*], where the duty or matter in dispute, is within the same limitation.

On the whole therefore, the case had better be returned by the consent of parties, to the Court of Requests, for the Commissioner to examine,—not whether there has been a regular and final settlement of account, which would give a perfectly new and available cause of action even though the dealings of the parties had not been originally matter of account at all,—but whether there was a current account between them at all, or a set of distinct and independent transactions. In the latter case, the plaintiff cannot, by now choosing to give credit for some of them, alter their nature; if on the other hand they are really connected and the balance is the whole debt, the Commissioner should proceed with the investigation. Mr. Warn will, of course, not apply to the Commissioner to proceed further with the case, unless, in his way of viewing it, the latter is the real history of his dealing with Mr. Gaudart. [*b*]

[*a*] Partnership suits, &c., quœre? *See* Maxwell's *Practice of the Court of Requests*, p. 16 *et seq.*

[*b*] *See* now Act XXIX. of 1866, and Ord. 3 of 1878, ss. 1, 53, 54.

EDWARDS *v.* EAST INDIA Co. *

MALACCA.
NORRIS, R.
1840.
Dec. 10.

It is no ground for excluding the testimony of a witness that he has been present in Court, and heard the evidence given by other witnesses: such a fact goes merely to the credibility of his evidence, but not to its admissibility.

A Magistrate is not legally justified in allowing a prosecution for breach of the Revenue Regulations to be withdrawn, since the offence is not of a private nature.

A Magistrate has power, after hearing out a case, to adjourn same to consider his decision.

Where the information and summons against the appellant charged with an offence under Section 11 of the Revenue Regulations of 1830,

Held, a conviction for an offence under Section 5 of such Regulations—with which he was not charged, nor informed of,—could not be sustained. [*a*]

This was a proceeding by *Certiorari*: the facts and questions connected therewith fully appear in the judgment.

The parties appeared in person.

Cur. Adv. Vult.

December 12. *Norris*, R. This is a "conviction" by two Magistrates, Messrs Minjoot and Oxley, on the 7th September last, of the defendant, for an alleged breach of the Spirit Farm Regulation, No. V. of 1830, section 5, in having retailed on the 9th May last one pint of brandy, and on the 8th June last one bottle of port wine, without a regular license; and the proceedings having been brought before this Court by a Writ of Certiorari on the defendant's affidavit on the 10th instant, when he was heard in support of his motion to quash the conviction, as contrary to law; I will now give the judgment of the Court. This might be done in very few words, as there is no great difficulty in the main question; but as many objections were raised by the defendant, it is right that each of these should be adverted to, and there are, besides, circumstances connected with the case which cannot properly be left unnoticed. The first objection urged by the defendant was, that the witness Crummy was heard, although present in Court during the examination of the Informer Smith, and this, notwithstanding the defendant's protest against the admissibility of such evidence. It appears in the face of the proceedings that the objection was not made until *after* Crummy's deposition had been taken, in which case it was too late. But allowing it to have been made in time before the witness was sworn, still it would amount to nothing. Crummy's having been present in Court and heard what Smith had said did not render the former an incompetent or inadmissible witness, though it might affect his credit; but of that the Magistrates were the sole Judges, nor, if the case depended upon that single point, would this Court interfere with the conviction any more than it could overrule the verdict of a Jury on any question of mere fact. The next objection was, that one of the Magistrates, Mr. Oxley, refused to be

* Coram: *Norris*, R. and *Garling*, Rest. Councillor.

[*a*] *See* now Ord. 6 of 1873, ss. 60, 61 & 62, where this can be done in certain cases.—J. W. N. K.

examined and to give evidence which was material to the defence: but it was clear from the defendant's own shewing, when urging in support of the objection, that the evidence intended to have been elicited related solely to the alleged practice of the Magistrate and other gentlemen in supposed breach of the Regulation; a point wholly immaterial since one offence cannot justify another, and therefore such evidence as the defendant was neither entitled to call for, nor the Magistrates bound to receive; another objection was, that although the Informer Smith, who was entitled to a moiety of the penalty, had expressed a desire to withdraw the prosecution, and confessed that it had originated in revenge, the Magistrates would not allow the matter to be compromised. The correctness of this statement was denied by the Magistrates, but admitting it to have been true, the offence charged was not of a private nature or such as it is quite clear the Magistrates would have been legally justified in allowing to be withdrawn. A fourth objection was, that as the Renter was the only person injured by the alleged offence, he alone was entitled to prosecute.

There might perhaps be some plausibility in this, with reference to other sections of the Regulation, but it is at least inapplicable to section 5th, the one under consideration; for the number and situation of the retail Spirit Shops being left not to the Renter, but to the Governor in Council, as an obvious matter of Police Regulation for the public peace and good order, any infraction of the Regulation in that respect is a manifest injury to the public. Again, it was urged, that the Renter being the only possible sufferer may waive his exclusive rights and sanction as many sub-retailers as he may see fit. But this argument also, however opposite with reference to the 11th Section of the Regulation, or rather to the provision substituted for it by Regulation X. of 1833, is inapplicable to the section now in question. It was further objected, that the conviction should have been immediate, and that the Magistrates were not justified in postponing their decision. This question does not appear to have been settled by any express judgment of the Superior Courts in England; but Chitty, whose authority in points of practice is great, conceives that a Magistrate may take time to consider of his decision, and even without this authority I should not hesitate, with reference to the peculiar circumstances of this Settlement, and the ambiguities of the Revenue Regulations, in coming to the same conclusion. The next and most material objection was the variance, which is undeniable between the original information and summons, and the conviction—the former stating an alleged breach of the 11th section of the Regulation and the conviction being for an alleged breach of the 5th Section; the former also stating a single breach on the 8th June, the latter being for two distinct breaches on the 9th May and 8th June. The defendant could only have come prepared to answer the charge in the summons, and the answer would have been complete that the 11th section had been repealed by a subsequent Regulation. Whether this objection was taken by the defendant, does not appear in the proceedings, although the charge

NORRIS, R. 1840.

EDWARDS v. EAST INDIA CO.

on *that* section was abandoned; but there is nothing to shew that the defendant when brought up was made sufficiently aware that he was then charged with a *different* offence, *viz.*, a breach not of the 11th but of the 5th section; for the offences are different, and the 5th section is referred to for the first time in the conviction itself on the grounds last stated, therefore, *viz.*, the variance between the original information and the conviction, and the want of distinct notice to the defendant of the precise offence with which he was charged, I should say that the conviction could not be sustained, even were there no other sufficient reasons for setting it aside. But there is a much stronger ground for quashing the conviction, though it was not I believe touched upon by the defendant; and that is, that the acts committed, supposing the information to have been perfectly clear and regular, do not amount to a breach of the 5th section as stated in the conviction. And I have the less hesitation in declaring this, as I am afraid the Magistrates were in some degree misled by myself, though in my own justification I must say that I had myself in the first instance been partially, but I am sure unintentionally misled by them. I am not unfrequently called upon to explain portions of the Revenue Regulations, and I feel that under the peculiar circumstances of the place, I should not be justified in withholding my opinion whenever asked; for I don't know where else the Magistrates are to look for a solution of their difficulties. The expression of my private opinion does not deprive parties of their remedy by appeal or Certiorari, and the worst that can happen is, that I may occasionally be wrong, and exposed to the mortification of expressing in open Court an opinion not altogether consistent with what I may have expressed elsewhere. Of the terms of the original Information and Summons in this case, I knew nothing until the day before yesterday, and the questions submitted for my opinion were in the following terms: "The question that "arises therefore, is simply this—is the Government entitled by "the Regulations to limit the number of spirit shops? and, "if so, are not all shops where brandy or other liquors are retail-"ed over and above those fixed by Government and duly regis-"tered, unlicensed shops and fineable under the Regulation"? Now I conscientiously believe that the Magistrates supposed these to be the *only* questions for decision, and as I too hastily took it for granted that they were, I immediately answered them in the affirmative;—and so far as these questions were concerned the opinion which I expressed was, with one qualification, right in the main though wrong as applied to the particular case. It is true a copy of the evidence [though not of the original information] was sent to me at the same time. But as the Magistrates had themselves failed to perceive the real qestion, so by the mode in which the case was brought before me, I was myself in some measure blinded, though I ought not to have been, and I am sure that there was no intention to mislead me. I must say too, in justice both to the Magistrates and to myself, that the scarcity of these and indeed of *all* the Government Regulations, and the difficulty of

obtaining a complete copy [I have none myself, that of the Court at Penang is imperfect, and I was obliged to borrow one for the occasion],—has long formed a subject of a just complaint; and it is no wonder therefore that Magistrates and individuals should occasionally be misled. The very limited number of copies, especially of the Revenue Regulations, would be a hardship even were they models of perspicuity and precision, but the hardship is increased by the acknowledged difficulties and obscurities with which they abound. Unless, therefore, it be in contemplation to revise the whole as has been recommended, a reprint is urgently called for. But to return, the real question in the present case is, whether [admitting the general right of the Government under the Regulation to limit the number of retail spirit shops, and the penal liabilities of unlicensed retailers] the selling of a bottle of *Wine* or *Brandy* at an unlicensed house or shop falls within the prohibition expressed or implied of the 5th Section of the Regulation? and I am clearly of opinion that it does not. The words in the 6th Section, it is true, are very comprehensive. The number of Houses to be appropriated "for retailing *spirituous liquors*," &c., and the marginal abstract of the preceding section is still more indefinite. "*Liquors* in less quantities," &c., so that, at first sight, both sections might seem to include spirituous liquors of *all* kinds, and the fourth Section to include *Wines* also. But on comparing section 5th with the language and general scope of the two sections, preceding it, the one immediately following it, and the last section of the Regulation [sections 3, 4, 6 & 23] all which expressly and exclusively relate to "*Asiatic* Spirituous Liquors," it is clear to my mind that the more general expressions of the 5th section were not intended to have a more general operation, but must with reference to those other sections be construed to mean "*Asiatic* Spirituous Liquors" and none other. This is further apparent from sections 9, 11, 15 & 16, which contain particular provisions with regard to wines, and European as distinguished from Asiatic Spirituous Liquors. On the whole, then, it is manifest, that in whatever light the acts imputed to the defendant might be viewed with reference to the Regulation No. X. of 1833, the present conviction cannot be sustained, and it is accordingly quashed.

Conviction quashed. [a]

[a] There are several points decided on this appeal, which are not abstracted into head notes, as turning on Regulations which have long since ceased to be law. The case also, as matter of history, shews, that the Recorders used in former days to act as private legal advisers to the Magistrates, though expressions of opinion then given, were not binding on them, when they sat as Judges of Appeal —on this point see *Preface, &c.*, Vol. I. of these Reports, p. lxxxv and also foot-note at the end of the decision of the same Recorder in *East India Co.* v. *Scott*, Civil Cases, Vol. I. of these Reports, p. 51.

MYMOONA *v.* MAHOMED.

PENANG.
NORRIS, R.
1841.
August 13.

A plaintiff sued a defendant in the Court of Requests, for money lent to the defendant, in order to help her in distress during her husband's illness, and obtained judgment against her. On appeal, this Court refused to interfere with the decision, although the loan was made to the defendant, a married woman, during her husband's lifetime, and since his death neither she nor any one else had taken administration to his estate.

This was a proceeding before W. T. Lewis, Esq., the Commissioner of the Court of Requests, brought up into this Court by *Certiorari*. The Commissioner had ordered the appellant Mymoona, the defendant in his Court, to pay a sum of $11.75 for money borrowed from the said respondent on account of distress through her husband's illness. The appellant denied that she knew the plaintiff or that she ever borrowed any money from him, but admitted that the debt was due by her husband, and now appealed *inter alia* on the ground that she was wrongly sued, inasmuch as she, nor any other person, had yet taken out Letters of Administration to the estate of her late husband.

The *Appellant* appeared in person.

The *Respondent* did not appear.

Norris, R.—The appeal in this case is refused, and the Court is glad to defeat an unconscientious endeavour [even in so small a matter] to resist an equitable claim on the ground of a legal informality. The petitioner, it is plain from the evidence, had the benefit of the charitable loan,—it was advanced apparently in simple reliance on *her* integrity,—and she has since her husband's death admitted her liability, by promising to repay the amount. I say *since*, for the conversation mentioned by the plaintiff's second witness may justly [after the decision of the Court below] be presumed to have been the same as that referred to by the defendant's own witness, which was only "four or five days" before the hearing.

Appeal refused.

LIM BEH & ORS. *v.* OPIUM FARMER.

PENANG.
NORRIS, R.
1842.
January 5.

The doubtful meaning of a Regulation or Act, or the inability to reconcile two apparently contradictory clauses, or uncertainty as to whether the alleged infringement is of any one or more particular sections, does not excuse a Magistrate from stating in the record of conviction, the particular clause or section of the Regulation or Act alleged to be infringed.

A conviction for "infringing the Opium Regulation" is uncertain and bad, and will, on appeal, be quashed.

General observations on duties of Justices of the Peace and the construction of their convictions.

This was a proceeding before two Magistrates of Penang, Messrs. Lewis and Nairne, wherein they convicted the appellants of breach of the Opium Regulations—and which, on application

of the prisoners, the appellants,—was brought up into this Court, by *Certiorari*.

J. R. *Logan*, for appellant.

The *Respondent* in person.

Cur. Adv. Vult.

January 11. *Norris*, R. The proceedings in this case have been removed into this Court by a Writ of *Certiorari* granted on the affidavit of the 1st defendant setting forth various grounds of objection involving for the most part, questions of a large and general nature, but which, for the present purpose, it is unnecessary to discuss, because upon the face of the proceedings, without going further, there is quite enough to warrant this Court in setting them aside. The judicial proceedings of Justices of the Peace in England, are subject to the control of the Court of King's Bench and of common right removable into that Court by Certiorari, unless where that remedy has been expressly taken away by particular enactment. The Charter [page 49] provides that all the Justices of the Peace, &c., within this Settlement, shall be subordinate to and all their acts and proceedings shall be liable to be enquired into, annulled, corrected and dealt with by this Court and by the like methods and process as near as may be, as all inferior Criminal Courts, Justices, &c., are subordinate to H. M. Court of King's Bench in England, and there is no special enactment, that I am aware of to take away or abridge this control in cases like the present. So that of the Court's power to deal with these proceedings I have no doubt, whatever may have been said or thought to the contrary. Nor is it less certain that "*common sense*," on which no two men can agree, is not the only oracle to be consulted by Justices of the Peace here, any more than by Justices of the Peace in England, both being alike bound by the tenor of their Commissions and their oaths to conduct their proceedings, not only "after their cunning, wit and power," but also "after the *Laws and customs of England and Statutes thereof made*." I do not say this reproachfully or from entertaining any idea that the Magistrates here are less competent or less conscientious than Magistrates elsewhere, but because a vague notion has, I believe, occasionally obtained in these Settlements that the summary decisions of the Magistrates are conclusive, and that they have no need to trouble themselves with forms, but have only to decide according to conscience and the best of their understanding. It being clear then, that the proceedings of the Justices of the Peace are subject to the control of this Court, and that they must be conducted like those of the Justices in England according to certain rules—rules prescribed by Law and indispensable to justice—the question is whether those rules have been sufficiently observed in the present instance. Now in *Burn's Justice*, which is or ought to be in the hands of every Magistrate, the law with regard to summary convictions in general, is very clearly stated as follows:

"The power of a Justice of the Peace to convict an offender in a sum-
"mary way without a trial by Jury is in restraint of the Common law, and in

NORRIS, R. 1842. — LIM BEH & ORS. v. OPIUM FARMER.

"abundance of instances a tacit repeal of that famous clause in the Great "Charter, that a man shall be tried by his equals; which also was the Com- "mon law of the land, long before the Great Charter, even from time im- "memorial, beyond the date of histories and records. Therefore generally "nothing shall be presumed in favor of this branch of the office of a Justice "of the Peace; but the intendment will be against it. For which reason this "special power is given to a Justice of the Peace by Act of Parliament, it "must appear that he hath strictly pursued it; otherwise the Common law "will break in upon him, and level all his proceedings. So that where a trial "by jury is dispensed withal, yet he must proceed nevertheless according to "the course of the Common law in trials by juries, and consider himself only "as constituted in the place both of Judge and Jury. Therefore there must "be an information or charge against a person; then he must be summoned "or have notice of such charge, and have an opportunity to make his defence; "and the evidence against him must be such as the Common law approves of, "unless the Statute specially directed otherwise; then if the person is found "guilty, there must be a conviction, judgment and execution, all according "to the course of the Common law, directed and influenced by the special "authority given by the Statute; and in conclusion, there must be a *record* "of the whole proceedings, wherein the Justice must set forth the particular "manner and circumstances, so as, if he shall be called to account for the "same by a Superior Court, it may appear that he hath conformed to the "law, and not exceeded the bounds prescribed to his jurisdiction.

"The difficulty of drawing up a conviction in due form hath induced the "legislature to institute a more apt and compendious method in divers "instances. These summary forms of conviction, which are specially directed "by Act of Parliament, are interspersed throughout this book under the titles "to which they respectively belong."

Dr. Burn then gives a "general form of conviction," which may easily be adopted in all material points to any conviction in these Settlements; supposing the words of the Regulation or Act under which the conviction is had, are in themselves clear. I am aware, however, and most people are aware, that the interpretation of the Revenue Regulations of these Settlements is frequently a matter of difficulty, and therefore it cannot occasion surprise should the Magistrates sometimes feel themselves at a loss. But the innocent ought not to suffer, nor even the guilty be convicted, because a Magistrate, doubtful of the precise meaning of a regulation, unable to reconcile two apparently contradictory clauses, or uncertain whether the alleged infringement is of this or that particular section, chooses to avoid the difficulty by shaping the charge and the conviction in terms so general as to include any supposable breach of any section or clause whatever. Yet such has been done in the present instance. The defendants are charged in the most general terms with "infringing the Opium Regulation." It is almost needless to say that the defendants were not legally bound to answer a charge so vague and undefined; for, if there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as he best may. Most of the Magistrates here are from time to time called upon to serve as Grand Jurors in this Court, and there is not one of them probably, but would in that capacity be shocked at the bare notion of finding a Bill, simply charging the accused with a violation of the general Criminal Act, 9th Geo.

IV., c. 74, which comprehends every grade of crime against person and property, from common assault and petty larceny to the most aggravated species of rape, robbery and murder—and if such precision and certainty be undeniably requisite in the higher Court, where the accused has all the advantage of a trial by Jury, *a fortiori* should these indispensable requisites be observed where he is deprived of that great benefit, namely in the proceedings of Magistrates in cases of summary conviction: an argument which should carry additional weight from the consideration, that the majority of the Judges of the higher Court are, like the Magistrates themselves, not lawyers by profession. Again it is equally clear in principle and from authority of many decided cases, that the conviction or adjudication to be of any avail must correspond with, and be no less definite and precise than the information and charge. In the present instance the charge or information itself being invalid, on the ground of uncertainty, the conviction and adjudication, if couched in the same general terms would, of course, and for the same reason, be equally invalid. But the record in this case does not mention any adjudication whatever, the sentence of the defendants to a fine of 200 Rs. each immediately following the statement of the evidence. Nor can this uncertainty in the information and conviction be remedied in this Court by any stretch of inference or intendment. For, independently of the general principle, above stated, that presumption and intendment will be hostile and not favourable to this branch of the Office of a Justice of the Peace; this Court has no means by which from anything appearing on the record, it could venture with any degree of assurance to guess at the precise charge and conviction which might have been intended. If, on a review of the evidence, this Court should consider that it all clearly pointed to one particular section, still it could not feel satisfied, but that the convicting Magistrates might have conceived it to relate exclusively to another and very different section. And the amount of the penalty would afford no better clue to the particular section intended, since penalties to the same amount are imposed in half a dozen different sections. On the whole then, for the reasons above stated, it is unavoidable that the conviction must be regarded as invalid, and it is accordingly quashed.

REGINA *v.* MEERA LEBBY.

PENANG.

MAXWELL, R. 1857.

October 1.

Section 36 of the Conservancy Act XIV. of 1856, has no application to the case of a house erected before that Act was passed, but the roof of which is renewed with inflammable materials, subsequently to that Act coming into operation.

The defendant was convicted by Thomas Braddell, Esq., Magistrate of Police, Penang, of having "made the external roof "of his hut in Prangin Road, George Town, within the limits "specially defined by the Municipal Commissioners of the said "Station with inflammable materials, to wit, attap leaves, contrary

MAXWELL, R. 1857.

REG. v. MEERA LEBBY.

"to Section 36 of the Conservancy Act No. XIV. of 1856, and "ordered to remove his roof within five days, and in default to pay "5 rupees for each day the roof was allowed to remain."

The Section in question enacts, that "the external roofs and "walls of huts or other buildings erected or renewed in or near "any street after the passing of this Act, shall not be made of "grass, leaves, mats or other such inflammable materials"; and that "it shall not be lawful for the owner of any hut or other "building in or near any street now having an external roof or "wall made of any such "material, and which is contiguous to "or adjoining any other building, to suffer such roof or wall to "remain for a longer time than two years after the passing of this "Act, unless with the consent of the Commissioners." It imposes a penalty not exceeding ten rupees a day, for every violation of these provisions.

A *Certiorari* was issued by this Court, upon an affidavit of the defendant made on the 28th September, 1859, which stated among other things, that his hut had been built "upwards of seven years" before the Act was passed.

The Conviction having been this day removed by such *Certiorari* into this Court, the defendant in person moved that the same be quashed.

Mr. D. C. *Presgrave*, Secretary to, and on behalf of the Municipal Commissioners, supported the conviction, and referring to the opinion expressed by the learned Judge when the *Certiorari* was issued, that the words "erected or renewed," at the beginning of the section, agreed with "huts or other buildings," and not with "external roofs and walls," he admitted that this seemed to be the true construction of the passage, and consequently that, to give the Magistrate jurisdiction, it was necessary to shew that the hut itself had been, in substance and effect, "erected or renewed" since the passing of the Act. But this, he contended, was sufficiently shewn, when it was proved that an entirely new roof had been put upon it since that time. Such a repair was, in effect, a renewal of the house. If the house were not "renewed" unless it were altogether re-built, then the word "renewed" was superfluous, since the word "erected" which preceded it, would meet every case of re-building. It was necessary to give due effect to every word in the Act, and this would not be done, if it were held that the repair of a house was not a renewal of it. Here the house had received an extensive repair. It had got a new roof, and such a repair was a renewal of the house. A different construction would be attended with great inconvenience; for if every body was allowed to make these repairs during the two years mentioned in the section, the Commissioners would find insuperable difficulties in enforcing the provisions of the Act, against all the owners of attap houses, when those two years expired.

Maxwell, R. said, that the section dealt with two classes of cases; huts built before the Act was passed, and huts built since. With respect to the latter, it totally prohibited their being constructed of inflammable materials, such as grass or attap. As

to the former, it suspended the operation of its provisions for a couple of years, and as much longer as the Commissioners thought proper. It was contended however, that this second class fell within the prohibition of this section, if they were repaired within the two years. When the *Certiorari* was applied for, he thought that it would be probably contended that the defendant was within the section, as it must be read as if the words "erected or renewed" agreed with "external roofs and walls," and not with "huts or other buildings"; but it seemed to him that such was not the right construction. Independently of the legal maxim which required that relative words should, in general, be referred to the next antecedent, the word "erected," at all events was appropriately applicable to "huts and buildings" than to "roofs," and afforded an additional reason for holding that what the Act prohibited was the construction of new houses with inflammable materials, and not new roofs of houses, already in existence. If the Legislature had intended to prohibit new roofs and walls, and not new houses and buildings only, the section would have declared, not that "roofs and walls of houses erected or renewed," &c., should not be made of grass, &c., but that "roofs and walls should not be erected and renewed" of grass, &c. It was now admitted, indeed, that this was the right view of the passage, but it was contended that to put a new roof on a hut, was in effect to "renew" the house. It was to be observed that the defendant was not convicted of having renewed his house of the forbidden materials, but of having made his roof of such materials, and the question was whether this amounted to the same thing. He thought not. He thought that the *roof* had been renewed, but not the *house*. If such a repair was a renewal of a house, then a new door, or even a new pane of glass with a window, might with equal propriety be so regarded. In those cases, he should say that the door or the pane had been renewed, but certainly not the house; and he should be much surprised, if he heard any body speak of his having put a new door to his house, as of having renewed his house.

It was unquestionably an elementary rule, that Acts of Parliament were to be so construed, that due effect should be given to every word, and he thought that his construction did not infringe that rule. By buildings "erected," the Legislature referred to totally new structures, by buildings "renewed," to buildings which replaced former ones. If the owner possessed of a house, pulled it, or the greater part of it, down, and then raised it afresh on the same spot, that would be a renewal of the building. It was in one sense, certainly, the erection of a new structure, but it was also the renewal of an old one, in the same sense that a man who removed altogether the old roof of his house and replaced it with a new one, might with equal propriety, in popular language, be said either to have renewed his roof or to have constructed a new one. This was the sense in which he thought the word "renewed" had been used by the Legislature in this section; and it seemed to him to be a much more reasonable sense

MAXWELL, R. 1857. REG. v. MEERA LEBBY.

to give it, than to construe it as equivalent to "repaired." Even if he thought the question more doubtful than it really appeared to him to be, he should lean to the limited rather than the wide meaning of the word, when he considered that this enactment was of a penal character, and encroached on the natural liberty which men had of building their houses with whatever materials they pleased. Mr. Presgrave had referred to the difficulty which the Municipal Commissioners would find in compelling the removal of these inflammable materials next year, if they had no power to prevent in the meantime such repairs as those now in question, but he, the learned Judge, thought that this difficulty was much exaggerated, for the Commissioners would have power of proceeding as gradually as they pleased. The Legislature, had wisely abstained from imperatively requiring the removal of all the objectionable buildings, as soon as the two years expired. It had left it to the discretion of the Commissioners to consent to such building continuing to stand as long as they thought it right. At the end of the prescribed two years, the Commissioners would be able to remove the buildings as fast or as slowly as they pleased, and they would, no doubt, exercise the power given them of consenting to the buildings remaining, in such a manner, and coupled with such conditions and stipulations, as would bring about the desired change gradually or without any great hardship on individuals.

For all these reasons, he thought the conviction could not be sustained, and must be quashed. [*a*]

[*a*] See *Reg.* v. *D'Oliveiro*, infrà. p 45

REGINA *v.* WILLANS.

PENANG. MAXWELL, R. 1858. May 31.

The fact that a labourer has already been convicted under Act 4, Geo. IV., c. 34, for absenting himself from work, is no bar to his prosecution under the same Statute for a second absenting, although during the existence of the same contract.

The Act 4, Geo. IV., c. 34, is law in this Colony, and the Magistrate's power under it, is not exhausted by such first conviction.

The Law of England [Common law, Equity, and Statutory] as applicable to this Colony, discussed.

Mr. James J. White, Agent and Attorney of the Right Hon'ble Edward Horsman, M. P., proprietor of several Sugar Estates in Province Wellesley, on the 29th May, on his own affidavit, obtained a Rule Nisi calling on William Willans Willians, Esquire, Justice of the Peace and Magistrate of Police, Province Wellesley, and one Chivatean, to shew cause why the said William Willans Willans, as such Justice and Magistrate, should not hear and adjudicate upon a complaint then or then lately pending before him, made by the said James J. White, as such Agent as aforesaid, against the said Chivatean, for unlawfully absenting himself from the service of the said Edward Horsman before the

term of his contract of service had expired. The Affidavit on which the Rule was obtained, was as follows:

I. James J. White, of Beach Street, Attorney and Agent of and for the Right Hon'ble E. Horsman, Esquire, M. P., of London, make oath and say:

1. That the said E. Horsman is proprietor of the *Valdor* Sugar Estate, in Province Wellesley, that one Chivatean did, on the 20th of November 1857, contract with the said E. Horsman, to work as laborer on the said Estate for 12 Calendar months from that date.

2. That the said Chivatean duly entered on the said service, but afterwards in the month of December, 1857, absconded from the said Estate and absented himself from the said service; that afterwards upon the complaint of Mr. Duncan Pasley, the Manager of the said Estate, against the said Chivatean for so absenting himself from the said service as aforesaid, made before John Rogers Alexander, Esquire, then being the Magistrate of Police at Province Wellesley, the said Chivatean was apprehended by a warrant of the said Magistrate, and sentenced by the said Magistrate to two months' hard labor in the House of Correction at Prince of Wales' Island.

3. That on the expiration of said term of imprisonment, the said Chivatean did not and would not return to the said service, to complete the term for which he so contracted to serve, whereupon on a complaint being made by me against him for the same, the said Chivatean was apprehended and brought before Mr. Willans, the present Magistrate of Police at Province Wellesley, who, upon examining into the nature of the said complaint, refused to adjudicate on the said complaint, on the ground that the jurisdiction given by the Act of Parliament, 4th Geo. IV., c. 34, had been exhausted by the previous conviction and punishment aforesaid, and that he could not punish the said Chivatean for a fresh absenting, upon the same contract, and thereupon discharged the said Chivatean who has continued to remain absent from the said service.

J. J. WHITE.

After the argument on the Rule, as hereinafter mentioned, by leave of Court, a further affidavit was put in by Mr. White, which was as follows:

We the undersigned Inhabitants of Prince of Wales' Island, severally make oath and say:

1. That we are employers of agricultural and other descriptions of laborers in this Settlement.

2. That the native Malay Population, only furnishes laborers for some of the lighter and occasional kinds of plantation work, and that the planters of this Settlement are dependant for all the ordinary heavy work of cultivation, as well as for most kinds of skilled labor, on the natives of China and India, who come to this Station for employment; and on natives of Java and other Eastern Islands, many of whom on their return voyage from their pilgrimage to Mecca, land and seek employment in Penang.

3. That the low rate of wages in India and China, and the needy condition of large numbers of the laboring class, in those countries, with the occasional prevalence of famine, have led to the establishment of a system of emigration by which, laborers who cannot procure employment at home, or who may be desirous of bettering themselves, but who have not the means of paying their passage, are enabled to come to this Settlement. This system consists in the owners or charterers of vessels, or other persons, providing a passage for such laborers, and in some cases, advancing small sums of money to them, for the use of their families, in consideration of which, the laborers undertake on their arrival, in Penang, to hire out their services to employers, with the condition of allowing a portion of their wages to be deducted every month, and applied in payment of their passage money and other advances.

MAXWELL R. 1858.

REG. v. WILLANS.

4. That from 4000 to 5000 Chinese, from 3000 to 4000 Indians, and from 1500 to 2000 Javanese pilgrims arrive annually in Penang.

5. That of these different classes of laborers, very few become permanent settlers in the Station; many of the Chinese proceed to the adjacent Malay and Siamese territories, where they engage in cultivation, tin mining or other occupations. Others, after they have acquired a little money, return to their own country—nearly all the Klings return to Madras, after a 3 or 4 years residence, and the Javanese generally return to Java, as soon as their engagements are completed. From this cause there is a constant demand for new laborers, to supply the annual deficiencies.

6. That on the arrival of a vessel with Chinese or Kling laborers, planters in want of labor, enter into contracts with these laborers, taking them into their service on monthly wages, and advance to account of their wages, the sum required to pay their debt to the persons who have found them a passage. The laborers on their part, agree to serve for a certain period usually from one to two years, or such other period as may be necessary until the advances made to them, have been liquidated, by the monthly deductions from their wages.

7. That many of the poorer pilgrims from the Eastern Islands, are obliged to take their passage back from Arabia on credit; and the rate of wages for labor, being higher at this station, than in their own country, they find it advantageous to disembark at this port and to take service as the other laborers, under similar contracts.

8. That on the completion of their periods of service, under such contracts, the laborers who remain in the Settlement, either continue in the service of their first employers, or find service with other masters, as monthly servants, or they obtain employment in town, and in the country villages, on their own account in some of the various branches of industry, which are provided and fostered by the increasing commerce of Penang.

9. That owing to the extension of cultivation in the Settlement, the supply of laborers has been for several years unequal to the demand, and in consequence the rate of wages and the amount of advances required by the laborers on first taking service, have increased, and still continue to increase.

10. That at present, the advances vary from $18 to $25 for Chinese, from $10 to $12 for Klings, and from $35 to $50 for Javanese and other pilgrims. That a considerable amount of capital is thus annually sunk by planters, the re-placement of which depends entirely on the power of the employer to enforce the contracts to serve, as the laborers possess absolutely nothing but their labor to answer for their liabilities.

11. That the great demand for labor and the facility with which persons without capital, can obtain from Government small pieces of Forest land for cultivation on their own account, has the effect of making the laborers discontented with their service, and they seek to get away in order to avoid payment of the liabilities they had contracted to refund.

12. That from the nature of planting operations, and especially of those on sugar plantations, planters are liable to suffer great and irremediable damage from the absence, refusal to work, or wilful carelessness of their servants, whether under advances or not.

13. It is therefore necessary for the safety and protection of the agricultural interests at stake, as well as for the general prosperity of the Settlement, that the local Magistrates should exercise and continue to exercise the power they have hitherto exercised of compelling the specific fulfilment of contracts to labor for hire, for, unless these are enforced, the cultivation of the principal staples of the Settlement will become gradually abandoned.

Signed. J. J. White, Brown, Nairne & others, [including Chinese and other Natives].

The Rule was argued this day, when Mr. W. W. *Willans*, the Magistrate, shewed cause.

Messrs J. J. *White* and *Chevalier* [a planter], supported the Rule.

Cur. Adv. Vult.

August 23. *Maxwell*, R. This is a rule calling upon the Police Magistrate of Province Wellesely to shew cause why he should not hear and adjudicate upon a complaint preferred by Mr. Duncan Pasley, against one Chivatean, an agricultural labourer in his employment, for having absented himself from his service.

It appears from the affidavit upon which the rule was granted, that Chivatean was sentenced last December by the former Magistrate of the same place, to two months' hard labour in the House of Correction for a similar offence; that upon the expiration of that term, "he did not and would not return to the said service," and that he was thereupon again apprehended and brought before Mr. Willans, who "refused to adjudicate on the second com-"plaint, on the ground that the jurisdiction given to him by the "Act of Parliament, 4 Geo. IV., c. 34, had been exhausted by the "previous conviction and punishment aforesaid, and that he could "not punish the said Chivatean for a fresh absenting upon the "same contract."

The question raised upon this state of facts is, whether the Magistrate's refusal to adjudicate was well founded. Before expressing any opinion upon it, however, it is necessary to determine whether the Statute under which the defendant was called upon to act, did give him any jurisdiction, as asserted in the affidavit; that is, in other words, whether it is part of the law of this Settlement. This question has never been decided in this Court, although the Act has been enforced by the Magistrates for many years past; and its decision depends, first, on whether any part of the Statute law of England of as recent a date as 1823, is in force here, and if it is, then, secondly, on whether this particular Act is, from its nature, applicable to this country.

How, and to what extent the law of England first became the law of the Indian Presidency towns, and incidentally, of this Settlement, has been the subject of much discussion. Sir Benjamin Malkin laid it down a quarter of a century ago, that "the intro-"duction of the King's Charter into these Settlements had intro-"duced the existing law of England also . . . . . and had "abrogated any law previously existing." *In the goods of* Abdullah, Morton's [Ind.] Rep. 19.† The same doctrine has long before been that of the Indian Supreme Courts, with respect to the introduction of English law within their respective jurisdictions; and no stronger proof of the firmness with which it was established here, can be cited, than the case in which Sir Benjamin Malkin applied it; for, though he expressed a strong doubt as to its soundness in principle, he acted upon it in a case where its effect was to abolish the law of Holland in Malacca, and to substitute the law of England in its stead. If this doctrine could now be disturbed, it could not be in this Court, where it must be treated as beyond the reach of controversy. But as it has been disputed, since Sir Benjamin Malkin's judgment, by the Indian Law Commissioners, and, before them, by Master Stephen in his report in *Freeman* v. *Fairlie*, 3 Meriv. 24, and has been some-

† Ecclesiastical Cases, Vol. II. of these Reports, p. 8.

MAXWELL, R. 1858. REG. v. WILLANS.

times questioned in local discussions in the Settlement, it may be as well to consider on what grounds it may justly rest. And as the learned Judge who laid it down, stated it to be subject to exceptions which he left undefined, it is advisable, at the same time, to examine whether it is subject to any and what exceptions or qualifications.

Having regard to the circumstances under which this place became a British possession, it may be doubted whether any, or if any, then what body of law ought *de jure* to have been considered at the time of the establishment of the Colony, as it *lex loci*, that is, as the territorial law applying to all classes of its inhabitants indiscriminately, without distinction of race, creed or nationality. The general rule of law determining what is the law of a territory is, that if the new acquisition be an uninhabited country found out by British subjects and occupied, the law of England, so far as it is applicable [1 *Bl. Com.* 107], becomes, on the foundation of the Settlement, the law of the land [2 *P. Wms.* 75], but that if it be an inhabited country obtained by conquest or cession, the law in existence at the time of its acquisition, continues in force, until changed by the new Sovereign. In the one case the settlers carry with them to their new homes, their laws, usages and liberties, as their birthright. In the other, the conquered or ceded inhabitants are allowed the analogous, though more precarious privilege of preserving theirs, subject to the will of the conqueror.

This Settlement however, did not fall exactly under either branch of the above rule. It was neither a Colony of British subjects, in the ordinary sense of the expression, nor can it be said to have been an inhabited country when ceded, because four Malay families were found encamped upon it, when it was first occupied by us [*Jour. Ind. Arch.* 409]. It was a desert Island belonging to the Rajah of Quedah, and ceded by that prince in 1786 to an English Corporate body, which was invested with *quasi* sovereign powers over territories in its possession, but which it held in trust for the British Crown. Indeed, it was once considered to be not free from doubt, whether the sovereignty of the Island was ever ceded [*id.* p. 295] [*a*]. Mr. Light and the body of Marines who first landed here, came, not as British Colonisers of a desert Island, but as a garrison to take possession of a ceded territory; and assuming that they were strictly British, and that they brought the law of England with them, yet, having regard to the temporary nature and object of their inhabitancy here, that law can hardly have been made the *lex loci* by them, but was only the personal law of the garrison and their followers, [*Rex* v. *Brampton*, 10 East, 282, 288]. The bulk of the first settlers were Chinese, Malays and Chulias [5 *Jour. Ind. Arch.* p. 9], who, obviously, could not establish their respective laws in a British possession as the *lex* or the *leges loci*; and the few Englishmen who established themselves here at the foundation of the Settlement, came, not as men assuming the dominion of a desert land, and settling on it as a matter of right, but as strangers permitted as a matter of favour, to dwell in a country belonging to a

[*a*] See the terms of the cession in 2 Jour. Ind. Arch. [New Series] 189.

quasi foreign power, with the government of which they had no concern. Mr. Light, the first Superintendent, was instructed to admit into the Island only such Colonists as he thought it safe and advisable to admit [*id.* p. 114]; and it can hardly be contended that the handful of Englishmen who were allowed to establish themselves here under such circumstances, and whose right to reside without the express licence of the Company, was more than once disputed [*a*], were such Colonists as carry their laws as their brithright, to their new homes. The Governor-General in Council, it is true, had power to make Ordinances and Regulations for the government of the place [13 Geo. III. c. 63, sec. 36], but the power was not exercised in declaring English or other law, to be the *lex loci;* and the Crown and Parliament remained equally silent.

Again, Penang being, at the time when it became a British possession, without inhabitants to claim the right of being governed by any existing laws, and without tribunals to enforce any, it would be difficult to assert that the law of Quedah continued to be the territorial law after its cession. Such a doctrine would imply that the continuance of the existing law in a ceded or conquered country, was the right, however precarious, of the late Sovereign or of the soil itself, rather than the privilege of the inhabitants. But the case of Jamaica, referred to in *Campbell* v. *Hall*, 1 Cowp. 212, shews that this is not so. Though taken from the Spaniards, Spanish law was not considered in force there, after all the Spaniards had left the Island. When an inhabited or conquered country is ceded, the new sovereign impliedly undertakes to administer the existing laws among his new subjects, until he changes them, but it does not follow that when the country is a desert, he is to be presumed to undertake that he will enforce the laws of the former Sovereign when settlers shall afterwards arrive. Another objection to the continuance of the former law would arise in this case, from the nature of the Mahometan law, which is the law of Quedah. Lord Coke laid it down in *Calvin's Case*, 7 Rep. 10, that "if a Christian King should conquer a Kingdom of an infidel, and bring them under his subjection, then *ipso facto* the laws of the infidel are abrogated"; and although Lord Mansfield treated this proposition as absurd, the Indian Law Commissioners are well justified, I think, in asserting that "a system of law which according to its own principles, can only be administered by Mahometan Judges and Mahometan arbitrators, upon the testimony of Mahometan witnesses, is not a system which can devolve *ipso jure*, and without express acceptance, upon a Government and people of a different faith" [*b*]. It seems to me impossible to hold that any Christian country could be presumed to adopt or tolerate such a system as its *lex loci*. In such a case, according to Coke, "until certain laws are established, the King by himself, and such Judges as he should appoint, should judge

[*a*] Minute of Mr. Phillips on the Landed Tenures of Prince of Wales' Island, p. 2 [reprinted 1884, p. 3.]

[*b*] Report on Petition of East Indians and Armenians—[App. *Rep. Ind. Law Comers*, 1842.]

MAXWELL, R. 1858.

REG. v. WILLANS.

the inhabitants and their causes according to natural equity, in such sort as Kings in ancient times did with their Kingdoms before any certain Municipal laws were given, as before hath been said" [*Calvin's Case*, 7 Rep. 10.], or, more probably, according to the third resolution of the Privy Council [2 *P. Wms.* 75], English law would at once come in force—the only natural equity known to English Sovereigns and English Judges.

But whatever ought, *de jure*, to have been the law of the land when the Colony was founded, it is clear beyond all doubt, that for the first twenty years and upwards of its history, no body of known law was in fact recognised as the law of the place. As to the law of England, so far was it from being regarded as the *lex loci*, that it was hardly recognised even as the personal law of its English inhabitants. This appears very clearly from the early records of the Local Government which were published a few years ago in the *Journal of the Indian Archipelago*, under the title of "*Notices of Penang*," by a gentleman holding a high office in the Settlement. In the first place, the law of England was not in force for the punishment of crime. Mr. Light was directed in 1788 "to preserve good order in the Settlement as well as he could," not by punishing those who offended against it, according to English or any other known body of law, but "by confinement or other common punishment," [4 *Jour. Ind. Arch.* 643] ; * and five years later he is found carrying out his instructions by "whipping and confining to the public works, or sending off the Island, the thieves, house-breakers and other disorderly persons" who he complained then infested the Island [4. *Jour. Ind. Arch.* 656]. But this jurisdiction extended only to those inhabitants who were not British subjects—*id.* 643. * These, it appears, he was ordered, at least in cases of murder, to send to Calcutta for trial before the Supreme Court there [5 *Jour. Ind. Arch.* 2.]*. But when, in 1793, a man named Sudds was accordingly sent there on a charge of murder, Sir W. Burroughs, the Advocate-General, gave it as his opinion, that "there was not any law by which the well-meant directions given to the Superintendent of Prince of Wales' Island . . . . could be supported, as far as they related to the trial or punishment of murder, or any other crimes at that Island" [5 *Jour. Ind. Arch.* 5] ;* for the jurisdiction of the Supreme Court of Calcutta was then confined to Bengal, Behar and Orissa [13 Geo. III., c. 63, s. 14]. When it was extended by the 39 & 40, Geo. III., c. 76, s. 20, to all factories and places subject to the Bengal Presidency, fresh instructions were sent [25th March, 1800] to Sir George Leith, the Lieutenant-Governor of the Island, directing that "Europeans guilty of murder or other crimes of enormity should be sent to Fort William" [5. *Jour. Ind. Arch.* 158] ; † but for lesser offences, they appear to have been left in total impunity. As late as 1805, the Governor complains that while provision had been made for the punishment of native criminals, "the more turbulent European remains on the Island free from all restraint, with the power of committing every

* See *Preface*, &c., Vol. I. of these Reports, p. iv.

† See *Preface*, &c., Vol. I. of these Reports, p. xii.

act of injustice and irregularity towards his neighbour and the most peaceable native, having set at defiance all authority as not legally established on the Island." [6 *Jour. Ind. Arch.* 93]. † It may be said that this proves the want of legally constituted Courts, rather than the absence of law; but Criminal law can hardly be said to exist where there are no tribunals to enforce it. However this may be, what Criminal law was in force was not English law. In 1794, a body of Regulations were passed by Lord Teignmouth, the Governor-General, for preserving the peace of the Island [5 *Jour. Ind. Arch.* 294] ; † and these appear to have continued in force, and indeed, to have been the only Criminal law in force, down to the time when the first Charter was granted.

Next, the law of England was as little recognised in Civil matters. Even the general rules of inheritance, which Blackstone considers to be among those portions of English law which are carried to their Settlements by English settlers [1. *Bl. Com.* 107], were wholly disregarded. Mr. Dickens, who was appointed in 1800, partly to act as Judge or Assessor to the Lieutenant-Governor [5 *Jour. Ind. Arch.* 167], and partly to frame a Code of laws for the Settlement, [*id.* p. 195] ; urged earnestly, in that year, that the Governor-General should enact a Regulation upon the subject [*id.* p. 119]; and even as late as 1823, we find Mr. Phillips, the Governor of the Settlement, mentioning that "the Rules which, according to British Law, govern the disposition and inheritance of real property have never been made applicable to our lands, &c."[*a*]. So, with respect to personal property. In 1804, Mr. Farquhar, the Lieutenant-Governor, in applying to the Supreme Government for instructions for the distribution of the effects of a person domiciled in the Island, who had died intestate, stated, that there was here "no law nor any fixed custom," according to which it could be distributed—[5 *Jour. Ind. Arch.* 409]. Again, slaves were bought and sold, not only openly, but with the sanction of the local Government, one of whose early cares was to provide Registers for those transactions [*b.*] ; and taxes were imposed by the sole authority of the Governor-General in Council, *viz.*, a duty of 2 per cent on all sales of lands and on the estate and effects of deceased persons [4 *Jour. Ind. Arch.* 646, 9]. Thus, two of the principles of English law were completely disregarded—that which makes a slave free when he touches British soil, or in other words, comes within the jurisdiction of British Law, and that which protects the subject from taxation except by his representatives. There were Courts and Judges here before the Charter, but the justice which they administered between man and man within their respective jurisdictions, was not in accordance with the rules of English law. In 1796, justice was administered in petty Civil cases among the various native populations,

† See *Preface*, &c., Vol. I. of these Reports, pp. v., xii., xxxiv.

[*a*] *Minute on the Landed Tenures of Prince of Wales' Island*, p. 8 [*re-printed* 1884, *p.* 8.]

[*b*] *Minute on the Landed Tenures of Prince of Wales' Island*, p. 10—5 *Jour. Ind. Arch.* pp. 102, 296.

MAXWELL, R. 1858. REG. v. WILLANS.

by the headmen or Captains, as they were called, of their own nation, nominated by the Superintendent, subject to an appeal to an European gentleman who acted as Magistrate, and who himself tried the more important Civil cases in the first instance [5 *Jour. Ind. Arch, 106, 193*].* By what law these headmen and the European Magistrate were guided, does not expressly appear;* but there is no reason to suppose that Malay, Chinese and Chulia Captains were appointed to administer any other law than that with which they might be presumed to be acquainted,—that of their own nation; while it is probable, from the representation of Mr. Dickens, that the Magistrate decided according to what is called natural justice, that is, according to his own notions of what was just. The following passage from Mr. Dickens' report addressed to the Governor-General in 1803, shews what was the actual legal condition of the Island at that period:

> His Excelleney in Council has been heretofore informed that Prince of Wales' Island, prior to its cession in 1785, was under the dominion of a Chief who governed arbitrarily, and not by fixed laws. It is now become my painful duty to state that it has so continued to be governed without fixed laws; for upon the hour of my arrival on this Island, there were not any Civil or Criminal laws then in existence, and there are not even now any Municipal, Criminal, or Civil laws in force on this Island. The law of nature is the only law declaring crimes and respecting property, which, to my knowledge, at this day, exists at Prince of Wales' Island; and as Judge, it is the only law which I can apply to the Criminal and Civil suits brought in judgment before me. But as the law of nature gives me no precepts respecting the right of disposing of property by Wills and testaments, the rights of succession and inheritance, and the forms and precautions necessary to be observed in granting Probates of Wills and Letters of Administration to Intestates' effects, or respecting many other things which are the subject of positive law, I have often been much embarrassed in the execution of my duty as Judge in the Court of Justice in which I preside; and many cases there are, in which I am utterly unable to exercise jurisdiction."

He adds:

> "The cultivation of the Island, the increase of its commerce and of its population, has made it necessary that fixed laws of property, as well as laws declaring what acts are crimes, should be promulgated by due authority" [6. *Jour. Ind. Arch.* 229].†

The result then, to be collected from the early records of the Settlement, is that for the first twenty and odd years of its history, the Country had no territorial law. The task of maintaining order among the early Colonists was left to the Commandant of the garrison. Crime was repressed and punished by a kind of martial law, that is, by such punishments as a Court Martial pronounce, and the Chief local Executive Authority, or the Governor-General in Council considered appropriate to the offence. In matters of succession, personal status, contract, and perhaps tort also, as many systems of law were in force as there were nationalities in the Island; and all those laws, again, were probably tempered or

* See *Preface*, &c., Vol. I. of these Reports, p. xxiii.

† See *Preface*, &c., Vol. I. of these Reports, p. xxvii.

modified by that law of nature, or that natural justice which appears to have been the chief guide of the European Magistrate who constituted the Court of Appeal. The state of society resembled in this respect that which existed in Europe after the destruction of the Roman Empire, as described by Savigny in the passage quoted by the Indian Law Commissioners:

"The spirit of personal laws reigned equally among the individuals of the different Germanic tribes; and the Franks, the Burgundians and the Goths lived on the same soil, each according to their own law. Thus is explained the following passage in a letter from Agobardus to Louis le Débonnaire 'one frequently sees conversing together five people, of whom no two obey the same laws.'" [*a*]

In the midst of all this confusion, this much, and indeed this much only, seems to be clear, that so far from the law of England being in force as the law of the land, its most general and elementary principles were not recognised even by the English portion of the community, or enforced by the existing tribunals.

It must be presumed that the Charter of 1807, was granted with a full knowledge of this state of things, and was intentionally adapted to it. No law was introduced *aliunde*, contemporaneously with the Charter. It was competent to the Crown to introduce the law of England into the Settlement by such an instrument as a Charter, *Campbell* v. *Hall*, 1 Cowp. 204; and if that law was not previously in force, and the language of the Charter directed that it should be administered here, it follows that the Charter did introduce the law of England into the Settlement; and the question, to what extent English law became the law of the land is, then, a question of construction rather than of general legal principle, or at least of the one as well as of the other.

Now, the Charter does not declare, *totidem verbis*, that that law shall be the territorial law of the Island; but all its leading provisions manifestly require, that justice shall be administered according to it, and it alone. As to Criminal law, its language is too explicit to admit of doubt. It requires that the Court shall hear and determine indictments and offences, and give judgment thereupon, and award execution thereof, and shall in all respects, administer Criminal justice in such or the like manner and form, or as nearly as the condition and circumstances of the place and the persons will admit of, as in England [*1st Charter, p.* 38]. And I think it equally plain that English law was intended to be applied in Civil Cases also. The Charter directs that the Court shall, in those Cases, "give and pass judgment and sentence according to Justice and Right" [*id.* p. 26]. The "Justice and Right" intended, are clearly not those abstract notions respecting that vague thing called natural equity, or the law of nature, which the Judge, or even the Sovereign may have formed in his own mind, but the justice and right of which the Sovereign is the source or dispenser. The words are obviously used in the same sense as in the well known Chapter of *Magna Charta* from which

[*a*] Report on *Petition of East Indians and Armenians*, [*Ind. Law Comers.* Rep. 1842, p. 449.]

MAXWELL, R. 1858. REG. v. WILLANS.

they were probably borrowed: "*nulli vendemus, nulli negabimus aut differemus justitiam vel rectum.*" They are, in jurisprudence, mere synonymes for law, or at least only measurable by it; and a direction in an English Charter to decide according to justice and right, without expressly stating by what body of known law they shall be dispensed, and so to decide in a Country which has not already an established body of law, is plainly a direction to decide according to the law of England.

The whole of the Charter appears to me to support this view. It gives the Court the powers of the Superior Courts of Law and Equity at Westminster, to be exercised as far as circumstances admit [*1st Char.* 16], without stating or leaving any room for presuming that it was intended that those powers should be exercised otherwise than in the same manner and under the same rules and principles as they are exercised in England. The classification of property into "real and personal," of actions or "pleas," into "real, personal, and mixed" [*id.* p. 38], and the power given to grant Probates and Letters of administration [*id. p.* 17], shew that the law of England was alone in contemplation. In the clause which directs that parties interested in administration bonds may sue in the name of the East India Company [*id p.* 20], to whom the bonds are executed, it incidentally implies that the rule peculiar to the Common law, that choses in action are not assignable, is to be in force. The clause which provides for the discharge of prisoners under writs of *Habeas Corpus* [*id. p.* 28], refers to a right which no other law gives to the subject, and which was not previously in existence here.

The negative evidence on this subject, is at least as strong as the positive. In no part of the Straits' Charters is mention made of any other law than that of England; and the silence is perhaps nowhere more remarkable than in those passages which purport to adapt the administration of justice by an European Court to the peculiar institutions of Asiatic races. Where Ecclesiastical jurisdiction is conferred on the Court [*1st Char.* 16], it is to be exercised only so far as the religions, manners and customs of the inhabitants admit. In the administration of oaths and of Criminal Justice, also [*id. p.* 38], and in framing process for carrying out the orders of the Court [*id. p.* 36], attention is to be had to the religions, manners and usages of the native inhabitants; but nowhere is it said that their laws are to be attended to, not even in matters of contract and succession, as in India. Indeed, the provision respecting the framing of process is expressly guarded by the provision that the prescribed adaptation to native opinions and usages shall go only "as far as the same can consist with the due execution of the law and the attainment of substantial justice." [*a*]

The exclusion of native law is also remarkable in the Clause

[*a*] The following note is taken from the *Journal of the Indian Archipelago*, [Vol. III. pt. I., p. 37], and was subsequently added by the learned Recorder to his decision:

"This clause authorises the Court to "frame such process, and to make such

empowering the establishment of Small debts' Courts. Although it is provided that the jurisdiction of those Courts may be ethnical instead of local, if thought advisable, nothing is said about applying native law to native Cases, but it is merely required that the "administration of justice" shall be adopted, so far as circumstances permit, to "the Religions, Manners and Customs," of the native inhabitants, while the Rules of Practice are to conform, as nearly as may be, to the Rules of English Courts of Request.

It may be said that with respect to at least two classes of Orientals, Mahometans and Hindoos, their laws are part of their religions, and that the Charter includes the former when it men-

"Rules and Orders for the due execution of the same, in all suits . . . . as shall be "necessary for the due execution of the powers hereby committed thereto, with an "especial attention to the different Religions, Manners and Usages of the persons "who shall be resident or commorant, within its jurisdiction, and accommodating "the same to their several Religions, Manners and Usages, and to the circumstances "of the Country, so far as the same can consist with the due execution of the law "and the attainment of substantial justice." In a newspaper report of a case at Singapore, Sir R. McCausland is represented to have cited in support of his decision, "those provisions of the Charter which would be otherwise wholly nugatory and inoperative, and which direct that all or any of the powers thereby committed to the Court shall be executed with an especial attention to the different religions, &c., and accommodating the same to their several religions." [See *The Straits Times*, 14th July, 1857]. If this report be correct, the Recorder of Singapore would seem to have understood the clause in question as requiring, not that the process of the Court should be framed, but that its powers should be exercised with attention to native religions, and be accommodated to them. But if this were its true meaning, powers already conferred and limited with all due modifications, would be incidentally modified a second time in a clause, the primary object of which, at least, was different; which second modification, again, is immediately afterwards neutralised by the concluding words of the Section. It seems to me reasonably plain that the meaning of the clause is, that the process of the Court is to be framed with due attention to native religions, and is to be accommodated to them as far as that can be done consistently with an exact enforcement of English law. The Court derives its powers from other parts of the Charter; and the object of this Clause, is to provide for the framing of the Orders and process necessarry to carry into effect the judgments and decrees pronounced under those powers. In doing this, it requires that the prejudices and habits of the various populations shall not be needlessly shocked or disregarded, on the one hand, and yet that the strict and full execution of the law shall not be impaired on the other. It is perhaps redundant to require that process shall not only be framed with reference to native religions, but shall also be accommodated to them. But the objection would be equally strong, if the words applied to the powers of the Court. It would be removed, indeed, if the words "with especial attention, &c.," could be read as applying to the powers, and "acommodating the same" as relating to process; but the word "and" immediately preceding "accommodating" is a grammatical obstacle to such a construction. I did not refer to the case in my judgment, because the reporter appears to me to have so wholly misapprehended the effect of the learned Recorder's judgment in another passage, that I could place no dependence on the fidelity of the report. The question in the Cause being whether a devise by a Chinaman, of land in the Settlement, upon trust, to apply the rents four times a year or oftener, in religious ceremonies for the testator's and his wives' souls, was valid, Sir R. McCausland is reported to have held that "the Statute against the accumulation of income" was "wholly English, and incapable, without great incongruity of effect, of being transferred, as it stands, into the code of a Country inhabited by people of so many different religions, &c." Why the Thelusson Act, which prohibits the accummulation of income for more than twenty-one years after death, except for paying debts or portioning children, should be inapplicable to this Country is, perhaps, not very obvious, as it rests upon grounds of general policy; but it is clear that Sir R. McCausland cannot have expressed any such opinion in a case where the devise, so far from directing an accumulation for a period exceeding the limit allowed by the Act, directed that the income of the property should be spent as fast and as often as it could well be collected, four times a year or oftener."

MAXWELL, R. 1858.

REG. v. WILLANS.

tions the latter. This might be so, if the Charter were a Mahometan or Hindoo instrument, but law and religion are too distinct in their nature, and to English apprehension, to be treated otherwise than as distinct in the construction of an English Charter.

I am aware that the Charter has been sometimes construed differently. I have heard, on good authority, of a Recorder who gave judgment in opposition to an array of English decisions; holding that the direction to decide according to Justice and Right, emancipated him from all established principles of law and equity, and referred him to his own discretion and conscience for his sole guidance, not remembering apparently that his discretion ought to be that of a *vir bonus*, and that the *vir bonus*, is he *qui consulta patrum, qui leges juraque servat.* [*Cowper* v. *Cowper*, 2 P. Wms. 753—152—judgment of Sir. J. Jekyll].

Sir Ralph Rice appears to have considered that the Criminal law was the only part of the law of England which was in force here, * and that in all Civil matters, justice was to be administered among the native populations according to their respective laws and customs. [Evidence before House of Lords, referred to in *Abdullah's Case*]. † This view was perhaps founded on the contract between the express mention of English law in the one case, and the more general "justice and right" in the other. It does not, however, necessarily follow that because the law of England is mentioned *eo nomine* in one passage, it cannot be the law intended by "justice and right" in the other; and any such inference loses its force when other considerations shew that the words have that meaning. If I might conjecture why they were used in preference to "the law of England," I should think it was, possibly, because the latter expression is in some measure ambiguous, since in one sense, at all events, it excludes that large branch of the law which is administered in the Court of Chancery. If the view expressed by Sir Ralph Rice were correct, we should have no territorial law here except in Criminal Cases, and the Court would be called upon to administer among Her Majesty's Subjects in all questions of Civil rights and obligations, of personal status and succession, as many different Codes of law as there were races or creeds in the Island. *Mutatis mutandis*, we should have here the state of things described by Savigny in the passage already quoted. The Europeans, Malays, Hindoos and Chinese, would all be living on the same soil, each according to their own law. But, as the Indian Law Commissioners observe, a Country governed by one of the civilised nations of modern Europe, and yet having no *lex loci* "would be a phenomenon without example in jurisprudence" [a], except, indeed, in India, where its want has long been felt, especially with reference to the status of Armenians and the half-caste or mixed races. However, Sir Benjamin Malkin expressed his entire dissent from this construc-

* The Court was evidently unaware of the previous decision of *Stanley*, R. in *Kamoo* v. *Bassett*, Civil Cases, Vol. I. of these Reports, p. 1.—J. W. N. K.

† *Ecclesiastical Cases*, Vol. II. of these Reports, p. 8.

[a] Petition of East Indians and Armenians. [*Ind. Law Comers. Rep.* 449].

tion of the Charter, observing that the distinction referred to between the Civil and Criminal law, was rather against than in favour of the more extended adoption of the native laws in the former ; and his opinion has been adhered to, I believe, by all his successors.

Having referred to those passages of the Charter which relate to the religions and usages of the Oriental races, I must observe that their effect has, more than once, and upon a question of very great importance, been, in my opinion, much misunderstood. Sir Benjamin Malkin, after referring to them all in succession, in *Abdullah's Case*, [*Morton's Ind. Rep.* 73], observed that " in the "general expression, the Charter seems to have intended to give a "certain degree of protection and indulgence to the various "nations resorting here ; not very clearly defined, yet perhaps, "easily enough, applied in particular cases, but not, generally, to "sanction or recognise their law." *

To these expressions, no other objection can be made, than that they are too general to facilitate the practical application of the law of England to the Oriental inhabitants of this place. But in a letter addressed to the Secretary of Government, dated July, 1837, the same Judge went further: "With respect to the law," he says, "whereby rights are constituted and established, I "understood the Governor-General to consider,"—and in a previous passage he had observed that the Governor-General's views did not differ from his own—"that it at present is, and ought in general "for the present to continue, the law of England, modified indeed "by considerations how far some of its particular provisions and "enactments are suitable to the circumstances of the Colony, and "administered in all Cases with a large and liberal regard to the "Manners, Usages and Religions of the different nations subject "to its operation, but containing no provisions or principles which "cannot be based upon that law so modified and construed . . . . "If I am right in these views," he goes on to say, "it follows that "all land held by tenures, amounting, by the terms of the Grant, "to a freehold interest, passes, not to the Executor for the benefit "of the next-of-kin, but to the heir-at-law." This was written before Act XX. of 1837 was passed. "Who this heir may be," he continues "may occasionally depend on considerations of "native usage and religion. These probably, ought to be more "liberally regarded in questions of legitimacy and relationship "than almost in any other. It would seem very difficult, for "instance, to refuse to treat a Hindoo son by adoption, as a son, "and consequently as an heir, in the absence of other sons ; or to "declare the eldest son of a Mahometan not to be the heir, because "his father had two wives at once, and he was the son of the "second marriage. But whatever degree of accommodation might, "in such cases, be given to the usages of different classes, the "foundation of the law remains the English law of inheritance." [*Ind. Law Comers. Rep.* 87].

In 1843, Sir William Norris held that the adopted son, and

* *Ecclesiastical Cases*, Vol. II. of these Reports, p. 11.

MAXWELL, R. 1858.

REG. v. WILLANS.

the natural and adopted daughters of a Chinaman domiciled in Malacca, were entitled to administration, and to the assets of the Intestate, to the exclusion of his nephew, resting his decision expressly upon the opinion of Sir Benjamin Malkin, as stated in the above passages: "The ground of my decision," he says, "is, "that I take the same view of the Charter as Sir Benjamin Malkin "did, with regard to the law to be administered in these Settle- "ments under that instrument, and which cannot be better express- "ed than in his own words." After citing the two passages above quoted from the judgment and letter, he adds:

"In the 5th paragraph of the report made on the 8th February, 1842, by the Law Commissioners, on the Judicial Establishment of the Straits, they express their concurrence in Sir Benjamin Malkin's view of the spirit in which the law of England should be administered in these Settlements; and I have myself adhered in practice to the same principles, frequently directing the two or three widows of a Mahometan intestate to rank as one widow, and their several children as one family, in the distribution of the estate. In one of the petitions in this Case, that of Gan Nio, dated the 25th August, 1842, the case of Mootoo Vallee is cited to shew that a natural daughter has been considered as legitimate for the purpose of inheritance."

I was ignorant of these views when a similar question came before me for decision some months ago, and I then held that the adopted son of a Chinaman domiciled here, was not entitled, in that character, to administration, or to distributive share of his adoptive father's land. On being made acquainted with the case before Sir William Norris, I anxiously reconsidered my own decision, but found no reason for holding it wrong in principle; and as Sir Benjamin Malkin's opinion, although entitled to the highest respect, was extra-judicial, while Sir W. Norris', seemed to have been adopted from his predecessor, rather than to have been the result of any independent consideration of the subject, I thought myself at liberty to abide by my own decision. I must add that I felt less hesitation in doing so, when I referred to the paragraph of the Indian Law Commissioner's Report, cited by Sir William Norris, for I gathered from it that they rather dissented from Sir B. Malkin's views, than concurred with them, if the latter was to be understood, as Sir W. Norris clearly understood him, as holding that the law of England, was to be modified *by the Court*, in the extensive manner in which he thought it should be modified in the case of the adopted child. "We concur with the late Sir "Benjamin Malkin and the Governor-General," the Commissioners say, "in thinking that it [the law of England] "ought not to be changed substantially, but modified by "*express enactment*, in the spirit in which Sir Benjamin "Malkin thought it should be administered, under a large "and liberal regard to the different manners, usages, and re- "ligions of the various nations of which the population is "composed" [*Rep. Ind. Law. Comers.*, 135]; clearly intimating that though they approved of the suggested modifications, they considered that they should be made by the Legislature, and not by the Judges. I can see nothing in the Charter to admit of such a departure as that in question from the English rules of inheritance

and nothing in the widest principles of Comity recognised by our law to admit of it. In truth, if the several passages referred to by Sir Benjamin Malkin in his judgment, be examined, they will be found, I think, to effect nothing more than would have been implied, if the Charter had merely ordained, in general terms, that justice should be administered according to the law of England, without more. The law of England, whersoever administered, respects, either *ex-comitate*, or *ex-debito justitiæ*, the religions and usages of strange sects and nations, to the extent to which the Charter requires that they shall be respected. Thus, if the Charter of 1807 had not expressly provided that witnesses should be sworn "in such manner as the Court should esteem most binding on their consciences," or, in the words of the last Charter, "regard being always had to their religious belief," the law of England would have permitted that our Mahometans, Hindoos and Chinese should be sworn according to the ceremonies of their respective religions,—*Omichund* v. *Barker*, Willes, 538, s. c. 1 Sm. L. C. 381.,* and assuredly the law of England would not have compelled those who were appointed to act as Constables, to do anything contrary to their religions, customs and manners, even if the Charter had omitted to provide that natives should be compelled to serve in that capacity only so far as their religions, customs and manners admitted. [*1st Char.* 41]. So, if the Court does not entertain proceedings *pro salute animæ* against Hindoos, Mahometans and Buddhists, it is not entirely owing to the limits imposed upon its Ecclesiastical jurisdiction by the express terms of the Charter; for they would be equally free in England, from any such molestation by the Ecclesiastical Courts. Again, a Mahometan who marries a second wife of his own religion and according to the rites of that religion, is not indictable for bigamy here; but it would be difficult to assert that if he were to contract such a marriage in England, he would be indictable at the Old Bailey. The offence was originally of Ecclesiastical cognisance only, and would seem to contemplate only the marriages of those people among whom Monogamy is an institution.

The only other passage which mentions native religions and customs is that which touches the framing and execution of process. This provision obviously relates merely to questions of procedure and practice; and besides, its effect is expressly limited as I have already observed, by the provision that native religions and usages are to be respected only so far as the due execution of the law admits. I may add that I am not acquainted with any instances of this adaptation here; and the only cases of it in India that I have heard of, are those mentioned by Sir C. Grey in a Minute dated October 2, 1829, [printed in App. V. to *Rep. on Affairs of East India Company*, p. 62] *viz.*, the practice, at Madras, of making orders for the maintenance of native widows without suit, and, at Calcutta, of deciding many disputes among natives out of Court by an award.

It does not seem to me, then, that the Charter has in any res-

* See also *In re* Native Witnesses, Criminal Rulings, p. 15, Vol. II. of these Reports.

MAXWELL, R. 1858. REG. v. WILLANS.

pect modified the law of England by any exceptional adaptation of it to the religions and usages of the East. With the exception of the perhaps superfluous instructions respecting the framing of process, it might have remained silent on the subject of religion and usage without affecting the administration of justice. In other matters of greater importance, respecting which the Charter makes no provision, native religions and usages are equally respected. Thus, if a Mahometan, or Hindoo, or Chinese marriage, celebrated here according to the religious ceremonies of the parties, be valid, it is not because the Charter makes it so—for, as I have already observed, it makes no exception in favour of native contracts of any kind—but because the law of England recognises it. The general rule of that law is, that the validity of a marriage is to be determined by the law of the place where it is celebrated. "The only principle," says Lord Stowell, "applicable to such a case by "the law of England is, that the validity of the marriage rites "must be tried by reference to the law of the Country where, if "they exist at all, they had their origin. Having furnished this "principle, the law of England withdraws altogether, and leaves "the legal question to the exclusive judgment of the law of the "place where the marriage was celebrated." *Dalrymple* v. *Dalrymple*, 2 Hagg. 59.

But where the law of the place is inapplicable to the parties, by reason of peculiarities of religious opinions and usages, then from a sort of moral necessity, the validity of the marriage depends on whether it was performed according to the rites of their religion. Referring to the Jews, Lord Stowell says: "there is in England a "numerous and respectable body distinguished by great singular-"ity of usages, who, though native subjects under the protection "of the general law, are in many respects governed by institu-"tions of their own, and particularly in their marriages; for, it "being the practice of mankind to consecrate their marriages by "religious ceremonies, the differences of religion, in all countries "that admit residents professing religions essentially different, "unavoidably introduce exceptions, in that matter, to the univer-"sality of the rule, which makes mere domicil the constituent of "an unlimited subjection to the ordinary law of the Country. "What is the law of marriage," he adds, "in all foreign estab-"lishments settled in Countries professing a religion essentially "different?.....No body can suppose, that while the Mogul Empire "existed, an Englishman was bound to consult the Koran for the "celebration of his marriage. Even where no foreign connexion "can be ascribed"—a case similar to that of the Eastern natives of this place—"a respect is shewn to the opinions and practice "of a distinct people. The validity of a Greek marriage in the "extensive dominions of Turkey, is left to depend, I presume, "upon their own canons, without any reference to Mahomedan "ceremonies. There is a *jus gentium* upon this matter; a Comity "which treats with tenderness, or at least with toleration, the opin-"ion and usages of a distinct people in this transaction of mar-"riage." *Pertreis* v. *Tondear*, 1 Hagg. 139.

How far the general law should circumscribe its own authority

in the matter, it may, as the same Judge observes, be difficult to say *a priori*; and unquestionably it is not easy to extend to Mahometan marriages that principle of Comity which the law of England has applied to Jewish marriages, without involving it in a recognition of polygamy, which has always been put by jurists beyond the pale of the Comity of Christian Nations. *Story Confl. L.* §§ 113a, 114; 2 *Kent Com.* 81; 1 *Burge Col. & For. Law*, 188. The question has never yet been decided by any Court in England; but Lord Brougham, while declaring in *Warrender* v. *Warrender*, 9 Bligh [N. S.] 89, that an English Court would never recognise a plurality of wives, seems to have been of opinion that in dealing with a Turkish marriage "there may be some room for holding "that we are to consider the thing to which the parties have "bound themselves, according to its legal acceptation in the "country where"—or, [in the case of a Mahometan marriage in an English possession], in the religion in which—"the obligation was contracted," 1 Cl. & F., 531, 2. In this place, where the law of England has been for the first time brought to bear upon races among whom polygamy has been established from the remotest antiquity, the Court has had to consider the question, and has always held polygamous marriages valid. Whether the Local Judicature erred, or not, in coming to this decision, I do not stop to consider. It is enough to say that if it decided rightly, it is not because our Charter demands an exceptionally indulgent treatment of the question, but simply because the principle which makes the validity of a marriage to depend upon the religions of the parties, extends to polygamous marriages; while, if the Court has been wrong, it has erred, not in adopting a principle foreign to, and at variance with the law of England, but in stretching, beyond its legitimate limits, a perfectly well established one.

Again, if a Mahometan divorce be valid here—and its validity has never been disputed, I believe—it must be, not because there is anything in the Charter to make it valid, but because the law of England recognises the right of a Mahometan husband to dissolve the marriage contracted by him according to the Mahometan law with a Mahometan wife; upon the same principle that it recognises a Jewish divorce effected according to the custom of the Jews, without reference to the laws of the State where it was pronounced. *Ganer* v. *Lady Lanesborough*, Peake 18. So, in the case put by Sir Benjamin Malkin, of a bequest by a Mahometan of property "to be distributed according to the law of God," I agree, and indeed I decided only a few months ago, that the distribution must be made according to the Koran; not, however, because the Charter requires that the English rules of construction shall be tempered by a liberal regard for the Mahometan faith, but simply because the strict rules of English law require that the intention of a testator shall be followed, and permit that that intention, in such a case as the supposed one, shall be ascertained in the same manner as Lady Hewley's gift to "godly preachers of Christ's holy Gospel," was ascertained to be intended for preachers of the religious party to which she belonged,—*Attorney-General*

MAXWELL, R. 1858. — REG. v. WILLANS.

v. *Wilson*, 9 Cl. & F. 355; *Attorney-General* v. *Pearson*, 3 Mer. 400—*viz.*, by extrinsic evidence, shewing what was the religion of the testator, and leaving it to the Court to infer from the fact so arrived at, in what sense the words in question were used.

In the same way, if the adopted or natural child of a Chinese or a Hindoo, is to be regarded as his heir, it must be, not by virtue of any provision in the Charter, but solely because the law of England recognises him in that character. But if there be any subject on which the Courts of all Countries, and especially the Courts of England and America, where the Common law prevails, are agreed in disregarding foreign law, and therefore foreign religions and usages also, it is that of heirship or succession to immoveable property. Even as to Contracts entered into, and instruments executed respecting immoveable property within its jurisdiction, it suffers no other law to prevail. It denies, *in limine*, all Comity to foreign laws in matters relating to realty, and declares that the law of the *situs* shall exclusively govern in regard to all rights, interests and titles in and to such property. *Story Confl. L.* § 463. So far, indeed, has this doctrine been carried, that in *Doe. d Birthwhistle* v. *Vardill*, 5 B. & C. 438, 2 Cl. & F. 517, 7 Cl. & F. 895, it was decided by the King's Bench, and afterwards by the House of Lords, in accordance with the unanimous opinion of the Judges, that a Scotchman born a bastard, but made, by the subsequent marriage of his parents, legitimate, under the law of Scotland, and legitimate therefore everywhere, even in England, for every other purpose, could not inherit real estate in England, because our law required that an heir should not only be legitimate, but should be born after the marriage of his mother. "This is a rule" says *Alexander*, C. B. in delivering the opinion of the Judges on the first argument of that case in 1835, "not of a personal nature, but of that class "which, if I may use the expression, is sown in the land, springs "out of it, and cannot, according to the law of England be "abrogated or destroyed by any foreign rule or law whatso-"ever . . . . . In selecting the heir for English inheritance, we "must inquire only who is that heir by the local law." 2 *Cl. & F.* 577. If the law of England, then, refuses the right and character of heir to one who, though by the law of his own Country legitimate, is not born before the marriage of his mother, how can it give them to one who is not legitimate by any law, or not a son at all of the person whose inheritance he claims? It is obvious that to hold that the natural son of the Hindoo, and the adopted son of the Chinaman is heir to his natural and adopted father here, would not be, as in the case of Mahometan marriage, to give an extreme application to an established principle of law, but to adopt one at variance with the law.

Both the learned Judges who expressed themselves in favour of recognising an adopted son as heir, appear to have treated the question whether one person was the son of another, as depending upon the same class of considerations as the question whether one person was the wife of another. But the two relations are radically different. The relation of husband and wife is one of con-

tract, and the question whether it exists or not is a question of law. The relation between father and son is founded in nature. The question whether it exists between two persons is a question of fact. The relation between father and legitimate son, who is also his heir, is the same, with this addition, under English law, that the mother was legally married to the father before the child was born. The relation involves a contract, it is true, but it is a contract with a third person, the mother, antecedent to the origin of the relation between father and heir. The question, then, whether that relation subsists, is a complex one of fact and law. If the widow, or the two or three widows of a Mahometan, are held entitled in this country to a share of their husband's undisposed estate and effects, it is because the law holds that their marriage, celebrated according to the rites of their religion, is valid, and created the relation of husband and wife. But a stranger decorated with the title of adopted son, or a natural son, whatever may be his rights under Hindoo or Chinese law, cannot succeed to real estate, as heir of his adoptive or natural father in a Country governed by English law, simply because not his offspring born after his marriage with the mother.

In this Country, it is true, freehold property, as far as regards its transmission on death or intestacy of the owner, is taken to be of the nature of chattels real; but chattels real are for the purposes of the question under consideration, immoveable property, *Story Confl. L.* §§ 374, 447, and therefore all rights, interests and titles therein or thereto must be equally governed by the law of the land. It may possibly happen that hardship will sometimes be the consequence of thus inflexibly applying our laws to men alien to us, not only in race and religion, but in all their habits and domestic institutions. This, however, is a question for the Legislature and not for the Bench. Judges and Lawyers may legitimately give it full consideration in applying the known and established principles of law to new states of facts; but if those principles are to be departed from or "modified," it cannot be done by those whose whole and sole duty is to administer the law as it stands. To leave it in the breast of the Judge to relax or supersede general restrictions and rules, whenever he thinks particular cases not within the reason of them would be, as Fearne says [*Cont. Rem.* 535*n.*], a greater mischief in its consequences, than that which is intended to be obviated by it; for this is in fact making the discretion of the Judge the only law in such cases. I must add, however, that I am unable to see any hardship in adhering in this Country, to the rigid rule of the Common law that all questions relating to land are governed solely by the law of the land. Owners of real estate are at liberty to devise it as they please; and they may therefore direct that it shall devolve [of course within the rule against perpetuity] in the course of succession established by the laws of their own nations or religions. To depart from the rule would, it seems to me, lead to great difficulty and confusion; and I cannot but think that those who would suffer Chinese, or any other law to have a voice in such questions, overlook the in-

MAXWELL, R. 1858.

REG. v. WILLANS.

convenience to which Mr. Justice Story points, "of any nation "suffering property locally and permanently situate within its "own territory, to be subject to be transferred by any other laws "than its own; and thus introducing into the bosom of its own "jurisprudence, all the innumerable diversities of foreign laws to "regulate its own titles to such property; many of which laws "can be but imperfectly ascertained and many of which may "become matters of subtle controversy." *Story Confl. L.* § 440. [*a*]

Looking back then, to the early history of the Settlement on the one hand, and the language of the Charters on the other, I think that Sir Benjamin Malkin had good grounds independently of the uniform course of authority on which he relied, for stating that the King's Charter had introduced English law into the Settlement. It was, no doubt, a startling consequence of this doctrine, that the laws of an old and civilised community were abolished by implication, while those of England were substituted in its stead; but I think that the Recorder would have found it difficult to administer "justice and right" according to the Roman Dutch law, under a Charter which, in the numerous particulars already adverted to, implied that the common law was the only law in force.

The Charter of 1807 having introduced the law of England into this Island, that law, as it existed at that date, would have been the law of this country, if another Charter had not been subsequently issued. This second Charter was granted in 1826, when Singapore and Malacca were first united to Prince of Wales' Island. The question then arises, did it import the later law into this Station? The case of *Rodyk* v. *Williamson* [*b*] was a Malacca case, and when Sir Benjamin Malkin decided in it that the law of England had been introduced there by the Charter so as to supersede the law of Holland, he must have held that the law introduced was the law of England as it stood in 1826, since the Charter of that date was the only Charter extending to Malacca. If so, the same law must, upon the same grounds, have been introduced into Singapore by the same instrument. Can it then have had a different effect in Penang? If it had not extended beyond this place "the justice and right" according to which it directs the Court to decide, might well have been understood to mean, as was suggested by Sir Benjamin Malkin, "the just and rightful administration of the Law which actually existed" [*Rep. Ind. Law Comers.* 87], that is, the law of the land as it had been already established

[*a*] Note by the Recorder to this decision [*Jour. Ind. Arch.* Vol. III., Pt. I., p. 27]:

"Very little information," says Mr. Medhurst in a learned article on Marriage, Affinity and Inheritance in China, "has been hitherto collected as to the local "usages in different parts of the Country, with regard to the rights of succession to "property in China." [*Transactions of the China Branch of the Royal Asiatic Society*, part IV., p. 30]. But if the information which he has collected be correct, Sir William Norris was misled in the Case cited, as to the Chinese law of inheritance; for the power of adoption appears to be strictly limited to the male relations of the next generation in a regular order of succession. Nothing is said of adopting daughters. Even legitimate daughters are not entitled to any share of their father's real or personal estate, except on failure of the male relatives who are the objects of adoption.

[*b*] See foot note [*a*] page 9 of *Ecclesiastical Cases*, [*In the Goods of* Abdullah], Vol. II. of these Reports.

and in force for the preceding eighteen or twenty years. But to adopt such a construction here after the decision in *Rodyk* v. *Williamson* [a], would be open to great objection. To treat the Charter *quo ad* one station, as merely reorganising a Court, while *quo ad* the other two it was treated as introducing new law, would be to give to the same instrument different meanings in different localities; a construction which would have neither convenience nor good sense to recommend it. I am therefore of opinion that whatever law the second Charter introduced into Malacca, was introduced into every part of the Settlement; and as it has been decided that the law of England, as it stood in 1826 was brought by it into Malacca, I am of opinion that the same law became, by the same means, the law of Penang.

Whether a similar construction should be put upon the Charter of 1855, it is not now necessary to consider because the Act upon which the present motion was founded, was passed before the date of the second Charter. But if that question should ever arise, it will perhaps be material to consider whether the circumstances of the Settlement, or the language of the Charter, require such a construction, or rather do not require that it should be treated, like all the Indian Charters granted subsequently to 1726, merely as an instrument reconstructing the Court. As the new Charter, confirmed in all respects by Parliament, [18 & 19 Vic. c. 93 § 4] gives the Judges of the Court "such jurisdiction and authority" as the Common Law and Equity Judges "have or lawfully exercise" in England, there would seem to be some ground for holding that any powers conferred on the latter by Statutes passed at any time before the date of the Charter, would vest in the former also. So, when it directs the Court to "hear," "give judgment and award execution" on "indictments and offences," "and in all respects to administer criminal justice in such or the like manner and form, as nearly as circumstances admit, as the Courts of Oyer and Terminer and Jail Delivery" in England, it might be contended that the English Criminal Law, as it stood in 1855, was thereby made the law here. On the other hand, it may be material to observe that the new Charter does not, like the preceding one, abolish the old Court, and introduce the law of England for the first time into new possessions, but only reorganises the existing tribunal by dividing it into two divisions and adding a second Recorder. It may also be important to bear in mind that since the date of the second Charter, a legislative body has been established in India, which legislates for the Straits, and that difficulties might arise in attempting to give effect at the same time to recent Acts of Parliament and Acts of the Legislative Council bearing on the same branch of law.

How much of the English Statute law which was in existence in 1826, is in force here, is, in some measure, as I have already said, a question of construction. The effect of the Charter of that year is, it seems to me, to make the English Criminal law in force

[a] See foot-note [a] page 9 of *Ecclesiastical Cases*, [*In the goods of* Abdullah], Vol. II. of these Reports.

MAXWELL, R. 1858. REG. v. WILLANS.

"as far as the condition and the circumstances of the place and the persons admit"; the civil law, "as far as circumstances admit"; and that branch which is administered in England by the Spiritual Courts, "as far as the religions, manners and customs of the inhabitants admit." In other words, it makes just so much of the law of England our *lex loci* as, according to Blackstone, is imported into a Colony newly founded by English settlers, *viz.* "as much as is applicable to the situation and condition" of the Settlement [1 *Bl. Com.* 107]. If a law of the mother country, either from the end at which it is aimed, or from the means by which that end is sought to be attained, is local in its character [2 *Mer.* 162, 3] or, even if it be not local, but injustice or inconvenience would arise if it were enforced in the Colony [1 *Moo.* P. C. 277] it is not part of the law of the Colony. It was upon the former of these grounds that Sir W. Grant held that the Statute of Mortmain [9 Geo. II.] was not in force in the Island of Grenada. "What the Legislature had to consider," he says, "was whether, as there was so much of the land of England already in Mortmain, it was not expedient to lessen the facility of putting more of it into that situation. That was a consideration purely local. It related to land in England, and to land in England only." *Attorney-General* v. *Stewart*, 2 Mer. 143, 162. And in another part of his judgment, he points out that the provision requiring that deeds of conveyance to Charitable Uses, should be enrolled in the Court of Chancery within six months of their execution, shewed that the Act could not apply to a Country which did not possess an Enrolment office, since its requisition could not be complied with there, otherwise what was a qualified prohibition in England, would be an absolute prohibition in Grenada. [2 Mer. 163]. So it was partly on the ground of the inconvenience and injustice which would ensue from the enforcement of the English law which incapacitates aliens from holding land, that the Privy Council held that that portion of our law was not in force in India—*Mayor of Lyons* v. *East India Co.*, 2 Moo. P. C. 172; and to all or some of the reasons above mentioned, may be referred the different classes of law mentioned by Blackstone as inapplicable to Colonies, *viz.*, "police and revenue laws, the mode "of maintenance of the established Clergy, the jurisdiction of the "Spiritual Courts, and a multitude of other provisions." [*Bl. Com.* 107]

Now, whether the Acts which provide for the punishment of labourers for wilful breaches of their Contracts with their Employers, come within any of the grounds which make Statutes of the mother Country inapplicable to this Colony, is a question upon which I felt some doubt, owing chiefly to a passage in the judgment of the Master of the Rolls in the case just referred to, *Attorney-General* v. *Stewart*. Sir W. Grant, there says; "Whether the Statute of Mortmain be in force in the Island of Grenada, will, as it seems to me, depend on this consideration—whether it be a law of local policy adapted solely to the Country in which it was made, *or a general regulation of property equally applicable to any Country in which it is by the rules of English law that property is governed.*"

[2 Mer. 160]. If this were strictly correct, no English law would be a part of the law of any Colony, unless it were equally applicable to every Country governed by English law. What Colonists would carry with them to their Settlements would be only such laws as were based on general principles of the widest application, and would not perhaps include among them some very suitable to their condition and very necessary to their wants. The provincial Courts to whom it appertains to decide in the first instance, whether the English Statute is in force in the Colony, would have to consider not merely whether, in the language of Blackstone, the law in question was "applicable to the situation and condition" of its own Settlement, or was "neither necessary nor convenient" to it, but whether it was, in its nature, of universal application in all English Colonies; a question which such a Court might often be very incompetent to decide, and have inadequate means of deciding. Having regard, however, to the manner in which the proposition is stated by Sir W. Grant, I do not think that he intended to lay down the law differently from Blackstone. He intended merely to decide that the Mortmain Act did not apply to Grenada, and he shewed that it did not, by shewing that it was, from its object and machinery applicable exclusively to England. But after all, the question here must turn rather on the words of the Charter, than on the language of Sir W. Grant; and I think that all that I have to inquire is, whether the Act in question is applicable to the situation and condition of this Settlement, that is, whether or not it is exclusively local in its object and in its machinery, and whether or not injustice or inconvenience would arise from enforcing it.

The Act certainly is not exclusively local in its object, which is to give an effectual remedy for wilful breaches of Contract by a class of persons against whom the ordinary remedy of an action for damages is altogether illusory. The mischief is not peculiar to England. It is, in truth, probably less great there, than in most of its possessions, and the remedy is not peculiar to England. The *Bengal Regulations*, for instance, provide a similar one in similar cases [Reg. 1819, p. 17 § 75]. I observe also, that one of the earlier Statutes on this subject, 20 Geo. II., c. 19, is included in a declaratory Act passed in the General Assembly of the Bahamas, for the purpose of preserving to the Colonists those "many good and wholesome laws" of which, says the preamble, they had "sometimes been in danger of being deprived" in consequence of doubts entertained as to to their being in all respects applicable to circumstances and condition of the Colony [*Clark's Col. Law*. 368]. And it is there placed in the same catalogue with such Acts as the Statutes of Merton, Westminster I. & II., and Gloucester, with the 13th & 27th Eliz., [avoiding voluntary conveyances as against creditors and purchasers], with the Statute of Frauds, the Habeas-Corpus Act [31 Car. II.], and other enactments of a similarly general nature.

In the next place, so far from any injustice or inconvenience being likely to arise from enforcing this Act of the 4 Geo. IV., it seems to me that both injustice and inconvenience would be the

MAXWELL, R. 1858. REG. v. WILLANS.

inevitable result, if some law of the same kind were not in force here. From the affidavit sworn in this matter by some twenty gentlemen, comprising all the leading employers of labourers in the place,—European, Hindoo, and Chinese [a], it appears that for all the ordinary heavy work of cultivation, as well as most kinds of skilled labour, the country is almost wholly dependent upon the natives of India, China and Java; that these men arrive indebted for their passage, and receive, on being hired, advances on their wages, varying from $18 to $25 for Chinese, from $10 to $12 for Klings, and from $35 to $50 for Javanese, [who are generally pilgrims on their way home]; that from 4000 to 5000 Chinese, from 3000 to 4000 Klings, and from 1500 to 2000 Javanese arrive annually, but that few remain long in the country—the Chinese dispersing into the adjoining Malay and Siamese territories, the Klings returning home in three or four years, and the Javanese as soon as their engagements are completed; and that there is a constant demand for new labourers. It appears also, that from the facility with which even the poorest can obtain forest land for cultivation on their own account, labourers soon become disinclined to work for wages, and the desire of avoiding the repayment of the advances made to them on their arrival, is another motive for inducing them to absent themselves, or otherwise wilfully misconduct themselves in their employment.

From this statement, I conclude that the Act is not only quite as applicable to the condition of this Settlement as it is to England, but that it is much more necessary to it; for not only is it more difficult to replace here a defaulting labourer by another, by reason of the scarcity of men, but also more improbable that damages should be recovered from the defaulters, since they are, as a class, generally in the last degree of destitution. Besides, in many cases, when a labourer in this place absconds, he not merely breaks his Contract, but defrauds his employer of the advances made to him, since he refuses to repay them in the only manner in which he can pay them, by his labour. Indeed, so important, so essential I might say, do some such stringent provisions as those of the Act in question appear to the welfare of the Settlement, that I fear I should deprive the community of one of those "many good and wholesome laws" to which it is entitled, if I were now to hesitate to hold that this Act was part of the law of the place. Lastly, the machinery by which the mischief is remedied, is not peculiar to England. It is in full force and operation here, for we have, under the Charter, both Justices of the Peace and a House of Correction. Seeing then, that neither the mischief, nor the means by which it is redressed, are peculiar to England, but exist here equally, and that no injustice or inconvenience can arise from enforcing the Act, I am of opinion that the 4 Geo. IV., c. 34, is law in this Settlement.

I now come to the question whether the Magistrate was right in declining to adjudicate upon the case, on the ground alleged, *viz.*, "that the jurisdiction given him had been exhausted by the

[a.] *ante* p. 17.

previous conviction." In support of this view of the Act, he has undoubtedly the high authority of the Chief Baron in *Ex-parte* Baker, 26 L. J. M. C. 155. In that case, the affidavits tendered to shew that the Magistrate had no jurisdiction, stated that the prisoner had been previously convicted and imprisoned; that on his discharge he had not returned to his service, and that he had thereupon been again committed. Pollock, C. B. says:

"I have come to the conclusion, I must say, satisfactorily to my own mind, that the Legislature, by the third Section of the 4 Geo. IV., c. 34, did not intend that a workman should be put into prison more than once for not fulfilling his contract. . . . . I cannot help saying, it appears to me contrary to the general spirit of the English law, and the administration of it, that a man should be punished thus over and over again, for what substantially is the same matter, and which for Civil purposes, would be considered and adjudicated to be the same matter, and which would admit of but one action being brought in a Common law Court in Westminster Hall" [*id.* p. 168].

This opinion is, to some extent shared by Mr. Baron *Martin*, who in the same case stated it to be his impression that the nature of the offence must be looked to, that "if the offence be a man's "absenting himself on a claim of right, and accompanied by a "declaration that he would absent himself for good, that all that "is but one offence, and ought to be dealt with as one;" while, if it was a mere absconding for a day or a few days, the Case was of a different character and should be regulated by a different set of rules [*id.* p. 166].

On the other hand, both *Bramwell* and *Watson* B. B., expressed themselves very decidedly of opinion that the Magistrate might convict a second time for a second absenting. *Bramwell*, B. observes:

"I do not think that the first absenting, and punishment consequent thereon, was a dissolution of the Contract. It may give to the Master a right to discharge the workman. If he does not avail himself of that power of discharge, the service continues, and there may be a second absenting himself from the same service" [*id.* p. 162].

Watson, B. says:

"When the imprisonment is over, he is still a servant; the Contract continues, and his absence again, is an absence within the Act of Parliament" [*id.* p. 160].

As, in this diversity of views, I am left to act upon my own, I adopt those of the last named learned Judges. Even the Chief Baron does not absolutely deny that the second absenting is a distinct offence, for he qualifies his assertion by stating that the two Acts are "substantially," that is, I take it, "not precisely" one. It is perhaps true, that in practice, the repeated acts of misconduct would be treated as one offence, and that one action only would be brought in respect of them; but it would be difficult to maintain the proposition, that, in strict law, a second absenting is not a sufficient cause for a second action. If a labourer could not be punished for a second absenting, he would have a

MAXWELL, B. 1858.

REG. v. WILLIAMS.

power which the law certainly denies to wrong-doers in all other cases, *viz.*, that of taking advantage of his own wrong; for he would be at liberty to rescind at his own pleasure his Contract with his Master, without the consent of the latter. But I do not think he has any such power. As far as he is concerned, the Contract continues binding, and it is his duty to return to the performance of it at the expiration of his sentence. If he wants it rescinded, he must endeavour to persuade the Magistrate to exercise in his favour the power which the Act gives him of discharging the servant from his Contract,—a power probably given for the protection of the labourer, but which would have been wholly superfluous if the latter had actually rid himself of his obligation by once breaking it. The Master, indeed, is at liberty to avoid the Contract, and it was contended in *Ex-parte* Baker, as in the present case, that on this account the man was not bound to return unless requested to do so; but I think that the objection was satisfactorily met by the answer of Counsel in the Exchequer, that if the Contract continued in force as against the Servant, a request to continue to perform it was unnecessary [*id. p.* 158].

It is clear that if the Contract were not voidable by either party, the Master would not be bound to give the servant notice to resume the performance of his part of it; and it seems to me that the privilege of rescission acquired by the Master through the servant's misconduct, gives no fresh right to the latter. The servant, by his default, can give his Master the option of rescinding the Contract, but cannot impose upon him the burden of a condition, not contained in the Contract. The only notice which the Master is, under such circumstances, bound to give, is, not a notice of his adherence to the Contract, but a notice of his intention to rescind it. Until such notice is given, the servant is bound to treat the agreement as subsisting, and to continue to perform his part of it [*a.*]

For these reasons, I think that the Magistrate ought to have heard and adjudicated upon this case; and the rule must consequently be made absolute.

Rule absolute.

[*a*] *Recorder's note* [*Jour. Ind. Arch.* Vol. III., pt. I., p. 27]:—"I was not aware, when I delivered this judgment, that a *Habeas-Corpus* had been moved for in *Baker's Case*, in the Queen's Bench, before the application to the Court of Exchequer. From the report of the case in the Queen's Bench it appears that all the Judges [*Lord Campbell*, C. J., *Coleridge* and *Erle*, J. J.] agreed in holding that the man's not returning to his service at the end of his imprisonment, was a second absenting himself from his service, and that he might be again convicted and imprisoned—See 26 L. J. M. C. 193."

REGINA *v* TAN AH FOOK.

PENANG.

MAXWELL, R. 1858.

October 5.

In order to render a person liable to conviction for gaming, it must appear he was gambling in a street or in a place used as a common gaming house: the fact of being merely found gaming with others in a casual private spot or house, does not bring the case within the Act.

The defendant was convicted before J. R. Alexander, Esq., Acting Police Magistrate of Penang, of having, under Section 57 of the Police Act 13 of 1856, been "found gaming in a place used for the purpose of gaming." The conviction having been removed by *Certiorari*,

Mr. *Nairne*, by leave of the Court, appeared on behalf of the defendant, a coolie on his plantation, and moved that the said conviction be quashed.

The depositions were returned with the conviction, in pursuance of Section 3 of the above Act.

Maxwell, R. held that the conviction was bad on the face of it, on the grounds that it did not shew that any offence had been committed. The 57th Section of the Police Act, enacted that "whoever was found in any *such* house, room or place, playing or gaming with cards, &c., or was found present there for the purpose of gaming, should be liable to fine, or imprisonment"; and it was under this Section that the defendant had been convicted. What kind of "house, room or place" was meant by "such house," &c., was shewn in the preceding Section. That enacted that "whoever being the owner or occupier, or having the use of any house, room or place, opens, keeps or uses the same for the purpose of gaming being carried on therein, and whoever, being the owner or occupier of any house or room"—here "place" was left out—"knowingly and wilfully permits the same to be opened, kept or used by any other person for the purpose aforesaid" shall be liable to fine or imprisonment. To constitute "gaming" an offence under Section 57 then, it must be carried on either in a house, room or place *used by its owner or occupier* for the purpose of gaming being carried on there, or in a house or room used by some body else for the same purpose with its owner's or occupier's knowledge and consent. In fewer and plainer words the only game prohibited was gaming in a common gaming house or hell.

Now, in this case, the conviction did not shew that the defendant was found gaming, or for the purpose of gaming, in any such house or place. The offence of which he was convicted was, "gaming in a place used for the purpose of gaming being carried on there." Used by whom? That did not appear. The language of the conviction would be literally correct, if the fact was that the defendant had been found by the Police gaming with a number of his friends in a shed or out-house in a gentleman's plantation, using that place on that single occasion only "for the purpose of gaming being carried on therein," not by the public generally, but by himself and his friends exclusively, and without the owner of the plantation having any knowledge of their being so engaged, or having consented to their so using his building.

MAXWELL, B 1858.

REG. v. TAN AH FOOK.

But if this were so, it was manifest that the defendant would not have been guilty of any offence under the Act. If it were said that the conviction was valid because it followed the words of the Act, and that the words "used for the purpose of gaming being carried on" must be understood in the same sense as in the Act, that is, as meaning that the premises were habitually dedicated by their owner or occupier for the purposes of a common gaming house, the answer was, first, that the conviction did not follow all the words of the Act, since it omitted to state that the place was used for gaming by or with the consent of the owner or occupier, and, next, that even if the words had been literally and completely followed, the conviction was not necessarily valid on that account. When the words of an Act describing an offence admitted of two constructions, it was necessary that the conviction should shew that the Magistrate had adopted the true one, in order that it should be put beyond the reach of doubt that the defendant had committed the offence prohibited by the Act. For example, the Act 9 Geo. IV., c. 69, punished by summary conviction any person who "shall by night unlawfully enter or be in any land, &c., with any gun, &c., for the purpose of taking and destroying game"; and in *Fletcher* v. *Calthrop*, 6 Q. B. 880, a conviction setting forth that the party convicted had unlawfully entered by night a certain close for the purpose of taking game, was held bad. It followed the words of the Act exactly, but inasmuch as the Act intended to punish only those who entered upon land by night for the purpose of taking game *there*, and it was consistent with the language of the conviction that the party convicted had in fact entered the close in question merely on his way to take game somewhere else, the Queen's Bench held that the conviction was bad. The language of the Act, of course admitted of the same wide construction, but that was not its true construction; and it was necessary that the conviction should shew by suitable words, and beyond all doubt, that the Magistrate had acted upon the true construction. It was not enough of the Magistrate in such a case, to follow the words of the Act, for the simple reason that the language of the Act became in the conviction the language, and as such was construed by the Superior Court by very different rules from those which they applied in construing Acts of Parliament. In the latter case, they gave to doubtful language the meaning that was most consistent with good sense—as in the case just cited; in the former, they did just the reverse, they intended nothing in favour of Magistrates keeping within the limits of their jurisdiction. If an Act admitted of a right and a wrong meaning, and the Magistrate did not say clearly that he had acted on that which was the right one, it was not taken for granted that he had adopted the right one; and the conviction could not be supported, unless this clearly appeared. Now here, it was plain from the language of Sections 56 & 57, that the only gaming which was penal was gaming in a common gambling house; and it was absolutely necessary that convictions under them should shew that the party convicted was gaming in such an establishment. Therefore, even if the conviction had

stated that the defendant had been found gaming in a place used by the owner or occupier for the purpose of gambling being carried on therein, it would have been doubtful whether it would have been good, as the words would have admitted of a meaning consistent with the defendant's innocence of having been in a gaming house.

It might perhaps appear to be sacrificing substantial justice to mere technicality and subtlety of construction, to quash convictions on such grounds, but this case afforded a striking illustration of the wisdom of those strict rules that were applied to the construction of convictions. He had said that it was quite consistent with everything that appeared on the face of this conviction that the place where the defendant was found gaming was a private building, the property of a gentleman who was wholly ignorant of the use to which it was being applied, and that the defendant with his companions had only assembled there on that one occasion for the purpose of amusing themselves by playing. When the evidence was looked at, for the purpose of seeing whether the conviction could be supported, it turned out that he had suggested as possible, and which might be thought an extreme case, was exactly the true state of the facts in the present case. It appeared on the depositions that the Police Jemadar, who had brought the charge against the defendant, had found him in company with a large number of Chinese coolies, playing at *Poh* in a shed in Mr. Nairne's plantation at Batu Feringi, but there was not a tittle of evidence to shew that the place was used as a common gaming house, much less that it was so used by Mr. Nairne or with his knowledge or concurrence. The defendant then, had not committed any offence. The Police Act did not punish mere gaming, but only gaming in gambling houses, and by Section 66, gaming in the streets ; and no conviction could be good unless it stated clearly that the gaming had occurred in the one place or the other.

Here the conviction did not aver that the defendant's gaming had taken place either in the one or the other. It was therefore bad on the face of it ; and as the evidence clearly shewed that it had occurred in neither the one place nor the other, it could not be amended. It must therefore be quashed.

Conviction quashed.

REGINA *v.* D'OLIVEIRO.

The roof or external wall, of a house built before the coming into operation of Act XIV. of 1856 and which is not contiguous to or adjoining any other building, cannot be compulsorily removed: and the fact that such roof is removed subsequently to the Act being law, makes no difference

A detached hut or building in existence before that Act, may therefore not only stand, but be repaired from time to time, provided such repairs do not amount to a renewal of the structure.

B. *Rodyk* on behalf of the defendant, had, on the 29th July,

MAXWELL, R. 1864.

REG. v. D'OLIVEIRO.

obtained a *Certiorari* to bring up the conviction in this matter. The conviction and evidence were, in pursuance to this writ, returned to this Court, from which it appeared that the defendant had, on the 2nd July aforesaid, been convicted by the Hon'ble H. Plunket, the Magistrate of Penang, "for that he did up to the 15th of June last, fail to remove the external attap roof of his house situated within the limits of the town as defined in a public notification by the chairman of the Municipal Commissioners on the 23rd January, 1857, in Leith Street, George Town, in Prince of Wales' Island, after notice had been duly served on him from the Municipal Commissioners, on 11th day of May, 1864, to remove the same within one month from the date of the said notice, against the form of the Act in that case made and provided," and was adjudged by the said Magistrate to pay a fine of two dollars and ten cents, being at the rate of ten cents per day from the 12th day of June, up to the date of the conviction. Neither the conviction, nor the evidence shewed, when the house had been built, nor whether it was contiguous to or adjoining any other building. Section XXXVI. of the Conservancy Act XIV. of 1856, under which the above conviction and order were made, is as follows:

> "The external roofs and walls of huts or other buildings erected or renewed in or near any street after the passing of this Act, shall not be made of grass, leaves, mats or other such inflammable materials; and it shall not be lawful for the owner of any hut or other building in or near any street now having an external roof or wall made of any such material, and which is contiguous to or adjoining any other building, to suffer such roof or wall to remain for a longer time than two years after the passing of this Act, unless with the consent in writing of the Commissioners; and whoever makes any external roof or wall of such materials, or suffers any roof or wall made of such materials to continue contrary to the provisions herein contained, and who shall not remove or alter the same within one month after notice given to him for that purpose by the Commissioners, shall be liable to a penalty not exceeding ten Rupees for every day that such roof or wall shall continue."

Roofs and external walls of houses not to be made of combustible materials.

Rodyk, in moving for the *Certiorari*, contended that the conviction was bad, for not shewing that the house of the defendant had been erected since the Act became law, or that it was contiguous to or adjoining another building, and cited *Reg.* v. *Meera Lebby* [*a*.]

The Hon'ble *Plunket*, the Magistrate, now shewed cause against quashing the conviction, and contended that Section 36 prohibited the construction of a new roof or wall of inflammable materials, whether the house was built before or after the Act, and whether adjoining or contiguous to other houses, or not.

Maxwell, R. The question raised by the proceedings is, whether the owner of a detached house, situated within the town, and in existence when the Act was passed, was, since and notwithstanding the Act, at liberty to put on a new roof of attap or inflammable materials on his house. The object and scope of the whole section

[*a*] *ante* p. 13.

seems to me to be this. The Legislature desired to preserve towns from the danger of fire arising from collections of huts and other buildings constructed, as they generally are in these countries, of grass, leaves and other such combustible materials. In dealing with the subject, it had to consider two classes of property, *viz.*, huts and buildings which should be erected after the passing of the Act, and huts and buildings already in existence. As to the former, there was no difficulty in simply and peremptorily prohibiting the construction of any, with grass or other dangerous materials. As to the latter, it was to be gathered from the language, what might almost be presumed *a priori*, that the Legislature, while protecting the paramount interests of the public, desired to interfere with private rights so far only as the public interests absolutely required and no further. Huts and buildings made of leaves were very perishable. In the course of very few years they must tumble to pieces; and they could not be replaced by others of the same kind, owing to the general prohibition against new huts. Some existing structures could not be suffered to continue standing even for that short space of time, *viz.*; those which were contiguous or adjoining to other buildings; and their removal was therefore required within two years. As to detached huts and buildings, they might be suffered, not only to stand as they were, but to be repaired, so long as such repairs did not amount virtually to a renewal of the structure, until they fell to pieces. It was accordingly enacted, with reference to huts and buildings to be built after the Act, that whether they were built on the site of old ones or on new sites, in other words whether built or renewed, *i. e.*, rebuilt, the roofs and walls should not be made of inflammable materials, and with reference to existing ones, that they should not be suffered to stand more than two years, if contiguous or adjoining to other buildings. This seems to me was the whole extent of the prohibitory enactment, read by the rules of legal construction.

Reading the section thus, the words "erected or renewed" agree with, or qualify "huts and buildings," and not "external roofs and walls," I hold this to be the right construction, in the first place, because qualifying words, like words of reference, should be read as applying to the last antecedent, unless there be some good reason against it. But it is said that such a reason is to be found in the words themselves. "Renewed," it is said cannot properly be used respecting a hut or other building, while it is applicable and commonly used in speaking of the construction of a new roof. This argument might be retorted by taking the other word, "erected," which certainly is applicable to a hut or building, though hardly so to a roof. But I do not feel the weight of the objection. If a roof may be said to be renewed when a new one is made, I do not see why a hut should not be said to be renewed when it is reconstructed. The word seems to have been used to meet an attempted evasion of the Act in two ways. By leaving an insignificant portion of the old building, when constructing what was, in substance, a new hut, the owner might possibly contend that he had not erected a new hut,

MAXWELL, R. 1864.

REG. v. D'OLIVEIRO.

and yet find it difficult to deny that his old one was in reality rebuilt, or renewed, by the extensive alterations made in it. Or, if he built an entirely new hut on the site of the old one, it might perhaps be open to him to contend that the prohibition against erecting new huts applied only where huts had not been in existence previously; but it would not be easy to establish that the word "renewed" did not meet the case of a construction on an ancient site. The word "renewed" was probably used to meet such cases. Whether putting a new roof on a hut, was not only a renewal of the roof, but of the hut, might possibly be a question, but this was not contended now, nor was the conviction for renewing the house.

It was next contended that the clause imposing the penalty, points out that "roofs and walls" of all houses old or new, are the subjects of the prohibition, and not merely those of new huts. I do not follow this reasoning. Unquestionably what is prohibited is "roofs and walls," but the question is whether the prohibition applies to those of old huts and buildings, and the penal clause only imposes a penalty in respect of roofs, &c., made "contrary to the provisions herein contained," that is, contrary to the enactment at the beginning of the section. If it had spoken of roofs and walls "erected or renewed" contrary to the preceding provision, there would have been a stronger ground for the argument.

Another reason for construing the words as I do, is, that a different construction would make the clause very ill-framed, and the words in question wholly unnecessary. If the intention was that no new roofs or walls of any buildings, old or new, should be made of grass, &c., the Legislature would have said so in those plain terms. The section would have run, "the external roofs and walls of huts and buildings shall not, after the passing of the Act, be made," or, "be erected or renewed" of grass, &c., and not that roofs and walls erected or renewed after the Act shall not be made, &c.

I may add here, that it may be a question whether the words "huts or other buildings," include a "house," the species of structure mentioned in the conviction. It is a rule of legal construction that a general word following a particular one is to be construed as confined to things of the same nature as the latter. For instance, the Act which forbids tradesmen, artificers, labourers or *other persons whatsoever* to exercise their ordinary callings on Sunday, does not include a coachman or an attorney, because neither is a person whose calling is similar to that of the classes particularly named; *Sandiman* v. *Breach*, 7 B. & C. 96, *Peate* v. *Dicken*, 1 C. M. & R. 22. Whether a house constructed of wood or stone, is a building of the same kind as a hut, and whether the more important structures would not have been specifically named—especially as "house" is the generic term, and is repeatedly used in other sections—if the Legislature had not intended to confine the prohibition to huts and other structures like huts, consisting wholly of grass, leaves, mats, &c., are questions which may be worth considering, but on which, as it is not necessary, I avoid expressing any opinion now.

It has been suggested to me, that the marginal note of the section might be taken as a key or guide to the meaning of the Legislature; and that in the present case it tends to support the construction put upon the section by the Magistrate, as it says, generally, that roofs and walls of houses are not to be made of combustible materials. This might be admissible sometimes perhaps; but then it must be borne in mind that the marginal note is only a general indication of the nature of the enactment to which it is attached. There may be simple cases where the words of a section are susceptible of two meanings, and the marginal note may decide which of the two is the true one. But it could be resorted to for such a purpose, I think, only where there is nothing in the body of the section to clear up the ambiguity. But here the marginal note would be invoked to control a construction sanctioned and required by several well established rules, and this, I think, would not be done. If any thing might be gathered from the note, it would be the conjecture whether the word "houses," which occurs in it, does not indicate that the same word stood in the section also, as originally framed, and was designedly struck out.

There being nothing in the language to require that the qualifying terms "erected or renewed" should be applied to any but the last antecedent words, are there other reasons for departing from the rule of construction? The object of the enactment is to guard against fires in towns, and it may be said that the Act should be so construed as to meet the mischief most effectually, and, as Coke says, to "advance the remedy." Unquestionably, the Act would be much more stringent if the other construction were adopted, and the remedy would be more advanced. But this rule is subordinate to the more general one, that the intention of the Legislature is to be gathered by reading the terms in which it expresses itself in their plain meaning and according to the ordinary rules of construction; and I think that, read by those rules, the Act must be understood as I understand it. But there is another important rule to be borne in mind in construing Statutes, namely the penal acts are to be construed strictly. This section materially abridges the Common law rights of the subject, and visits with penalties those who transgress against it. This reason alone would be decisive against the construction put upon the Section. To take qualifying terms from the words to which they *primâ facie* belong, and apply them to others, where they are unnecessary, thereby giving the sentence a clumsy form, and to attribute to other words a meaning perhaps wider and more comprehensive than naturally belongs to them, might possibly be justified under special circumstances; but to do all this for the purpose of giving extension to a penal enactment would be contrary to every principle of law and legal construction.

While giving therefore, every credit to Mr. Plunket for his argument, it seems to me that the Act does not apply to the case which was before him. The conviction consequently must be quashed.

Conviction quashed—Costs to be paid by Magistrate. [a]

[a] The Order of Court, among records, is to this effect.

VELLOO PULLAY *v.* KADIER & ANOR.

PENANG.

HACKETT, J. 1870.

September 6.

The absence of Counsel for a prisoner, although unavoidable, is no ground for postponing the trial of a case; and the refusing to do so by a Magistrate, is no ground for an appeal, although the prisoner be convicted.

The appellant was convicted of theft by D. C. Presgrave, Esq., Acting Magistrate. He had engaged Counsel to defend him, but owing to the unavoidable absence of Counsel in the Supreme Court, the case was proceeded with by the Magistrate, and the appellant convicted as stated. A postponement on the ground of Counsel's absence was applied for by the appellant, but refused by the Magistrate. After the conviction, the usual notice of appeal was served on the Magistrate [on the ground that he had improperly refused to adjourn the case on account of the absence of Counsel], when he refused to state a case deeming the application frivolous.

Bond for the appellant now moved the Court, under the Appeals Act 27 of 1867 [*a*], for a *rule nisi* on the Magistrate, to shew cause why a case should not be stated. A rule having been granted,

D. C. *Presgrave*, the Magistrate, shewed cause, but chiefly relied on the insufficiency of the affidavit on which the rule was obtained.

Bond in support of the rule, contended that the affidavit was sufficient, and that this was a good ground for appeal.

Hackett, J. held that it was no ground for an appeal, and discharged the rule with costs.

Rule discharged with costs.

[*a*] Re-enacted by Ord. 12 of 1879.

REGINA *v.* MAHOMED OOSMAN & ANOR.

PENANG.

HACKETT, J. 1871.

June 30.

A person who is charged with assault and robbery cannot be simply convicted of the assault. A charge stating an assault to have been "feloniously" made is bad, the word "feloniously" not only being surplusage, but actually converting an assault, which is a misdemeanour, into a felony.

Semble. The Statute 24 & 25 Vict. c. 96, does not extend to this Colony.

This was an appeal from the decision of D. C. Presgrave, Esq., Acting Magistrate. The facts of the case, as far as are material, sufficiently appear in the judgment.

Bond for appellants.

D. *Logan* [*Solicitor-General*] for respondent.

Hackett, J. This is an appeal from the decision of the Magistrate, on the ground that the conviction was bad. The appellants were charged with having "unlawfully and feloniously assaulted and robbed one Nina Merican Noordin," and were convicted of the assault simply; there being no evidence of the robbery. The Solicitor-General,

who appeared in support of the conviction, among other cases, cited the case of *Regina* v. *Guttridges*, 9 C. & P. 471, as in point, and I at first certainly thought that that case was a direct authority, but on consideration I find it is not so. The language in the charge in that case was different. The defendant was there charged with rape, which includes an assault, it was a felonious, not a common assault, as in the present case. On these grounds, I don't think the case of *Regina* v. *Guttridges* is an authority at all as to the point in question. I then thought the word "feloniously" was mere surplusage, but on looking up the authorities, I find it's no such thing; and as to this point, the case of *Regina* v. *Pelfryman*, 2 Leach's C. C. 563, is a direct authority. That was a case of highway robbery, and the indictment omitted to state that the "assault" was "feloniously" made. The Court held that the omission made the charge bad. The special enactments in England,—such as the 24th & 25th Vict., c. 96, which enacts, that if a person be charged with an assault with intent to rob, he might be convicted of the assault simply,—do not extend here; but if they did even, it would not affect the present question, as the appellants were not charged with an assault with intent to rob, but with actual assault and robbery. On the whole then, I think that the conviction is bad, and accordingly allow the appeal with costs.

HO GHEE SIEW & ANOR. *v.* NACODAH MAHOMED.

A prisoner who commits an offence out of the jurisdiction, cannot be proceeded against, unless it be under Act 1 of 1840, or VII. of 1854, and the Information for a Warrant for his arrest, ought to disclose such facts as bring the case within those Acts. [*a*]

Therefore, where A. laid an information, against B, alleging that certain tin belonging to him was stolen by a third party at Larut, and that such third party had shipped the tin on board B's vessel, and ordered him to get it resmelted, so as to obliterate A's marks, and then to bring the tin to this Settlement for sale, which B. accordingly did, knowing all the while it was stolen property,—and praying for a search-warrant to seize such tin and compel B. to give an account of the manner in which it came into his possession,—but did not comply with the provisions of either of the above named Acts, or disclose such facts as to bring the case within those Acts,

Held, [affirming the decision of the Police Magistrate], that the Information was insufficient, and on the face of it, no jurisdiction appeared, and that therefore a search warrant ought not to issue.

A Magistrate has power to recall a warrant issued by him, although it may be in the hands of the Police, if he subsequently considers that by granting the warrant he exceeded his jurisdiction.

R. C. *Woods*, jr., moved for a *Mandamus* to be issued to D. C. Presgrave, Esq., Acting Magistrate of Penang, commanding him to issue a search warrant for certain tin in defendant's possession, which had been brought over to Penang for sale. It was alleged that this tin was stolen property and had been resmelted, and then brought over to Penang. The Magistrate had, at first, granted a

[*a*] See now 37 & 38 Vict., c. 38.

HACKETT, J. 1872.

HO GHEE SIEW & ANOR. v. NACODAH MAHOMED.

warrant; but on further consideration, recalled it, believing that he had no jurisdiction, the offence having been committed in Larut. By direction of the Court, notice of this application was served on the Magistrate, and

Woods moved for the *Mandamus*. The first Affidavit states that the search warrant had been executed, but the tin afterwards released by order of the Magistrate, without trial. The second Affidavit states that the Magistrate has since declared, that though he had granted the search warrant, he had withdrawn it before execution. On application being made to a Magistrate, he should either grant or refuse to issue process. In this case, a search warrant was granted, and is alleged by the Magistrate to have been withdrawn. I contend that a Magistrate has no power, having once granted a warrant, to recall it and order it not to be proceeded with in due course of law. I submit the Magistrate was *functus officii* as regards the warrant, after he had granted it. The warrant should be executed, and the case should come before him or some other Magistrate in the usual way. I submit the order of the Magistrate to the Police Officer not to proceed with the matter was illegal. The granting of the warrant is analogous to a judgment which, according to Mosely on Inferior Courts, p. 410, citing *Webster* v. *Mason*, 8 Dowl, 705, could not be altered by the Judge, without the consent of parties. A Criminal Judge would be in the same position.

[*Hackett*, J. Is this granting of a search warrant equivalent to a Judgment?]

I submit it is—the granting is a judicial act and is discretionary. Here it was granted and the remaining act to be done was ministerial, that is the execution of the warrant.

[*Hackett*, J. Suppose the Magistrate grants a search warrant, and afterwards he finds he has acted illegally, must he go on?]

I submit he must allow the search warrrant to proceed. On the execution of the warrant, a trial must be had, and then the question of illegality or jurisdiction can be argued.

[*Hackett*, J. I do not agree with you there.]

A *Mandamus* will issue to Judicial Officers. *Tapping on Mandamus*, 176; 12 Mosely 340, 1; Mandamus will issue even to a Judge of the Vice-Admiralty Court. The facts are shortly these: The information alleges a larceny was committed in Larut, that a Malay resmelted the tin there, obliterated the Chinese Chops on the slabs, and then came to Penang with the tin, and it was feared he was about to sell or dispose of it.

[*Hackett*, J. Could the case be tried here, the property being stolen in Larut?]

I would submit that the Magistrate has jurisdiction to seize the tin, and put the person in possession of it on his trial, to account how he came by it.

[*Hackett*, J. What right have you to get a search warrant? If there is property in my house which you think yourself entitled to, would the Magistrate be justified in granting a search warrant? Is not your remedy a civil one?]

I submit the Criminal Court would retain the stolen property.

As to jurisdiction the Penal Code provides by Section 3 that certain offences though committed out of the Colony may be tried here.

Mr. *Presgrave* [the Magistrate]. I submit that if on the Affidavits the Court thinks a warrant should issue, time may be given to argue the matter.

[*Hackett*, J. I suppose you considered after granting the warrant, that you had acted illegally].

Yes, that is so.

[*Hackett*, J. The only question I think is, whether the Magistrate has jurisdiction.]

The Court, I submit, will not compel a Magistrate when he entertains a reasonable doubt of jurisdiction to do any act which may subject him to an action—*Rex.* v. *Buckinghamshire Justices*, 7 D. & R. 689, 1 B. & C. 485, s. c. 3 Nev. & M. 68. So far also from compelling him to proceed in a matter in which he has interfered, provided there is good reason for withdrawing,—it is laid down in *Rex* v. *Roderip*, 7 D. & R. 861, 5 B. & C. 239, that even when Justices have proceeded to convict for an offence, they cannot be made to carry out the sentence when it is doubtful that such conviction is good. If such course is open to them after extended procedure, I submit the same may be done where the steps taken are initiatory.

[*Hackett*, J. The only question is one of jurisdiction, and I fail to see any.]

Woods. This is a very important case which will decide numerous others, and it is of such importance, that I do not think it should be decided without great deliberation, and that time should be given to argue the point of jurisdiction.

November 4. The case was now again argued.

Woods. The Magistrate has jurisdiction to grant a search warrant in this case. I am in possession of a case, which was kindly mentioned to me by Mr. Ross, reported in the *Pall Mall Budget*. It was a case against one *Wasowsli* [*a*], for having in his possession certain property stolen at Warsaw, from whence a man of the same name as the prisoner had absconded. The case was tried in England at the Mansion House, and Counsel for the defence took the objection that as the offence was committed abroad, and there was no extradition treaty with Russia, the man could not be tried in England, but the Clerk of the Court suggested that as the property was alleged to have been stolen, and was found in his possession in England, he should be called on to give an account of how he came into possession of it. The Magistrate remanded the prisoner, but allowed bail. It was not a case of search warrant, but the man himself was arrested and put on his trial. It is all the stronger here, where simply a search warrant is wanted. Chitty on Criminal Law, page 14, lays down that the Magistrate has jurisdiction, and cites *Rex* v. *Kimberley*, 2 Strange 848, and *Mure* v. *Kaye*, 4 Taunt, 34; and at page 16, Chitty repeats the same thing. This is by the Common law, and the

[*a*] This case was afterwards dismissed on this very objection—See *Home News*, 18th Oct. 1872, p. 12.

HACKETT, J. 1872.

HO GHEE SIEW & ANOR. v. NACODAH MAHOMED.

Magistrate is perfectly justified in granting the warrant. In *Rex* v. *Kimberley*, the prisoner was accused in England, of abduction in Ireland, and it was held that he could be sent to Ireland. This case cites Keb, 225, 2 Vent. 314, Fitzg. 611. In *Mure* v. *Kaye*, there was a special plea setting out an offence committed abroad, the plea was held bad on demurrer, as being too general. Baron Heath was clearly of opinion that a Magistrate had jurisdiction to arrest a man for an offence committed abroad. This was in 1811, before any extradition treaty was made.

[*Hackett*, J. In this case it is a question of search warrant, not of arresting a man. What object have you in detaining the property ?]

We first proceed against the property, then against the man himself.

[*Hackett*, J. Under what section of the Penal Code do you proceed ?]

Under several, we are allowed our choice, first under section 430.

[*Hackett*, J. I don't think that section is applicable]

Also under sections 410, 411 and 414. The case falls within all these sections. The defendant by resmelting the tin became *particeps criminis*. We have throughout the information alleged the defendant's guilty knowledge. In *Burn's Justice of the Peace*, p. 1000, it is stated the Magistrate has jurisdiction not only over crimes committed in the place where he is, but also abroad, as where an offence is committed in one Country, the man may be tried for it in another, citing 2 Hale, 71, also offences committed on the high seas, citing *Rex* v. *Woallen Park*, 24. If the prisoner cannot be brought up under the Penal Code, he can be brought up for conspiracy.

[*Hackett*, J. Conspiracy—where ?]

First in Larut. He conspired abroad and carried out the crime here. *Reg.* v. *Bernard*, 1 F. & F. 240.

[*Hackett*, J. In that case even, there was a doubt, in consequence of which Lord Palmerston wished to pass an Act, which was rejected by the House of Commons.]

Forsyth in his opinions on *Constitutional Law*, 246, cites and comments on this matter, and thinks the case triable without any Statute. The Judge there declared it was a question for the Jury. I submit that a careful perusal of that case will clearly shew that although the prisoner conspired abroad, still he was held liable to be tried in London. Here it is stronger,—the defendant conspired in Larut, and came here to dispose of the tin. The distinction between a search warrant, and arresting a man is clearly pointed out in 2 Hale, 159. The search warrant is issued not for the trial of the man, but simply to get evidence ; a mere means of getting to the end. The Act 9 Geo. IV. c. 74, Sec. 109, which is not repealed expressly by the Penal Code, is also applicable. The offence was committed in Larut : the moment he came here with the tin, he became liable to be called upon to give an account of this property.

[*Hackett*, J. I want to know the exact section under which you charge this man.]

Section 414.

[*Hackett*, J. Does it not mean stolen within the jurisdiction of the Court?]

The words are large enough to mean both within as well as without. The section does not say stolen within the jurisdiction. If there is jurisdiction at Common law, it does not matter whether the man is subsequently released or not; but I submit he can be charged with conspiracy. He comes here with stolen property knowing it to be stolen and tries to dispose of it. I am not limited by the section of the Penal Code already mentioned but under the whole of that chapter. The authorities cited, all shew the jurisdiction, but none can be shewn in which the contrary has been held. In *Rex* v. *Bernard*, the indictment was for Murder in Paris. By the Common law, it does not matter where defendant conspired, as long as he comes here and makes some move in pursuance of it. The cases which seem to militate against me are distinguishable. The first is the *Burmese* v. *Regina*, 7 Moore Ind. App. 72, in which it was held that the Court had no jurisdiction over a murder committed abroad. This is clearly distinguishable, the murder was at once committed, only one act, and there was no repetition: *Khu Poh* v. *Wan Mat*, [Straits L. R. 247,] in which our late Chief Justice held there was no jurisdiction. It was an action for a tort and conversion in Quedah, but the property was never brought within the jurisdiction. *Reg.* v. *Lewis*, 26 L. J. M. C., prisoner was indicted for giving a blow to the deceased abroad, from the effects of which the deceased died; here it was held the Court had no jurisdiction, but this was also a single act, and there was no repetition of it within the jurisdiction. *Regina* v. *Bjosson*, 34 L. J. M. C. 180, a prisoner was indicted for murder abroad, there again it was only one act without any repetition of it. But here there was a conspiracy: prisoner comes here continuing the offence, by keeping possession of the property, and trying to dispose of it. In cases of finding stolen property, three or four months are allowed, but here only last month the tin was stolen. The authorities cited are sufficient to shew the jurisdiction.

[*Hackett*, J. They do not touch on a search warrant.]

No, they shew the person can be arrested, but here a search warrant is simply wanted which therefore makes this case all the stronger. If the Magistrate can arrest and commit a prisoner, I submit *a fortiori* he can seize by search warrant.

[*Hackett*, J. You have not asked for a warrant against the man, have you?]

No, the search warrant commands the property to be seized, and to bring up all persons in possession of it,—2 Hale, 150, 151, what is to be done with the goods and the persons. If he knew the property to be stolen that is enough to detain him as an accessory after the fact. *Reg.* v. *Shaw*, 34 L. J. M. C. cited and followed in *Koo Boo Ann's* Appeal, lately decided by your Lordship, [27th April, 1872—not reported.] shews that we can amend the charge by inserting conspiracy. The case in the

HACKETT, J. 1872.

HO GHEE SIEW & ANOR. v. NACODAH MAHOMED.

Pall Mall Budget conclusively shews the Magistrate has jurisdiction notwithstanding there is no Extradition Treaty. The Indian Acts 1 of 1849 and 7 of 1854, and the cases in Strange and Chitty, all shew a Magistrate has jurisdiction. If he has no jurisdiction, then this place will be a nest of robbers, and any thief can come here and dispose of any stolen property without hindrance. The Magistrate, I submit, has jurisdiction first, to grant a search warrant, and secondly to detain the man till asked for by the foreign sovereign.

Mr. *Presgrave* [the Magistrate] supported his order. I submit the Magistrate has no jurisdiction in a case like the present. The case just cited by learned Counsel from a newspaper is entirely against him. The objection there taken, is precisely what it is at present. It remained unanswered and the case went off on another point. The prisoner was charged with being in possession of property fraudulently obtained, and he was remanded on bail for further enquiry. I am surprised at the argument of Counsel, since it is commonly known that offences committed in Foreign Territory by the Law of Nations can only be tried in the country in which they occur. The cases cited by learned Counsel are those in which British subjects are concerned, and that may make some difference. The Magistrate I take it, has no jurisdiction given him by the Penal Code and none at Common law. The second section of the Penal Code provides for all offences committed within the Colony, and by the third section, provision is made for offences committed beyond the limits of the Colony. With regard to the first section there is no difficulty, and with respect to the third, the meaning is less clear. If the other sections referred to by Counsel had reference to crimes committed without as well as within the Colony, there would be no need of such a provision, as that contained in the third section. The latter section says "any person liable by law" to be tried for any offence committed beyond the Colony, shall be tried and dealt with under the Code for any offence committed by him beyond the Colony in the same manner as if such act had been committed within the Colony." It does not say liable by the Code, but "liable by law." Now if we refer to the same section in the Indian Penal Code of which ours is almost a copy, it will appear quite clear what is meant by these words "liable by law." The words of that section are as follows: "Any person liable by any law passed by the Governor-General of India in Council, to be tried for an offence committed beyond the limits of the said territories, shall be dealt with according to the provisions of this Code in the same manner, &c."

I contend that the section of the Straits Code we are considering, refers to the Indian Acts mentioned by the learned Counsel, *viz.*, Acts 1 of 1849, and 7 of 1854 which provide for the punishment of persons on certain conditions, such as British Subjects, or, as the Act says, those who have resided within the British territories, for six months, and who have committed offences in other countries. I have had several cases under those Acts, but prosecutions have always been ordered by Government in terms of the Act. All that has been said about the Penal Code is

clearly untenable. I think it is hardly necessary for me to make any further remarks on this point, and I will simply refer to the Acts quoted.

[*Hackett*, J. Has not the Magistrate independent jurisdiction under the Act in case of necessity?]

I am not aware he has,—before proceeding to put the Act in force, I have always received instructions from Government.

[*Hackett*, J. Mr. Mayne, the Advocate-General of Madras, is of opinion that in certain urgent cases, the Magistrate has independent jurisdiction, and section 19 of the Act would imply as much].

Such being the case, the information is improperly laid. If the other side is proceeding under the section and Act in question, it is necessary that the Information should be laid in terms of the Act. With regard to arrest at Common law for offences committed beyond the ordinary jurisdiction of English Courts, Criminals are triable only in the countries where the offence is committed. *Forsyth on Constitutional Law*, p. 248 : "As regards Criminal Law, the *lex loci* must needs govern all Criminal jurisdiction from the nature of the thing and the purpose of that jurisdiction," he quotes *Warrender* v. *Warrender*, 9 Bligh [N. S.] 89, also Heath, J. in *Mure* v. *Kaye*, 4 Taunt., also *Keighley* v. *Bell*, 4 Fos. & Fin., 763. The same principle is laid down in Wheaton's International Law. At page 113, para. 179, and in stronger terms, he says : " It is evident that a State cannot punish an offence against its Municipal laws, committed within the territory of another State unless by its own citizens ; nor can it arrest the persons or property of the supposed offender within that territory ; but it may arrest its own citizens in a place which is not within the jurisdiction of any other nation, as the high seas, and punish them for an offence committed within such a place or within the territory of a Foreign State." He goes on to shew that countries such as Great Britain and the United States have gone so far as to make their own subjects or citizens punishable for crimes committed in a Foreign State ; but adds that public jurists differ as to the propriety of such a course. Should the Court be of opinion that there is sufficient jurisdiction for a Magistrate to act, I submit that the information is not of a nature sufficient to justify a warrant being issued ; most of the evidence is given second hand, and the little that is primary does not corroborate the other—I ask that the application be dismissed with costs.

Woods in reply. Sections 403 & 425 of the Penal Code apply to this case. The argument of the other side is simply with respect to crimes committed abroad, but the crime in the present case is carried out here by bringing the tin within the jurisdiction. There is no doubt that there is no jurisdiction over an offence committed in Larut, but here only a search warrant is wanted against the property, so as to get the man to explain how he came by it. The other side has not even commented on the case in Strange. It might be said it is an old case, but it has never been questioned ; on the contrary, Forsyth at page 246, quotes it. Several other cases are cited in this case

HACKETT, J. 1872.

HO GHEE SIEW & ANOR. v. NACODAH MAHOMED.

which we have not been able to get, but no case has been cited against us overruling it or otherwise questioning its authority. The Dutchman's Case [*Mure* v. *Kaye*, 4 Taunt. 43] is against the Magistrate's contention—both Chitty and *Bernard's Case* [1 F. & F. 240], clearly shew the jurisdiction.

[*Hackett*, J. Why did you not charge the man? In the case mentioned in the newspaper produced, the man was charged—you don't shew yourself within any of those cases. There is not a single case that you have cited which is in point; none of them touch on search warrants.]

No, but they clearly shew the Magistrate has jurisdiction in the present case. Our not asking the man to be arrested, can do us no harm, we can do so now if the Court says there is jurisdiction. If there is no jurisdiction in the present case, then there will be an end of search warrants.

[*Hackett*, J. Supposing he bought the goods, could he be tried?]

The evidence at the trial will shew whether he bought the goods or not.

[*Hackett*, J. What have you to say about the Information?]

It is sufficient—It shews the theft, this man participating in it by resmelting it, and bringing it within the jurisdiction, and trying to sell it.

[*Hackett*, J. The Information states that the parties are informed of certain things, but does not state the names of those who gave the information.]

The persons who gave the Information swear to the Information themselves as well.

[*Hackett*, J. They do not say the property was stolen, but only speak of the shipment.]

And the resmelting as well.

[*Hackett*, J. I shall look into the Cases; the proceedings here are most extraordinary, and no case in point has been cited.]

Woods. I would refer the Court to 2 Hale P. C. Ch. 18.

Cur. Adv. Vult.

November 11. *Hackett*, J. Mr. Woods moved on behalf of one Ho Ghee Siew and Wong Pak Leng, for a rule calling on D. C. Presgrave, Esq., Magistrate of Police for Penang, to shew cause why a writ of Mandamus should not be issued against him compelling him to cause the search warrant mentioned in the affidavit to be executed.

It appeared from the affidavit filed on behalf of the applicants, that an Information was laid before the Police Magistrate on the first instant, wherein it was stated that Ho Ghee Siew and Pak Leng, two residents of Penang, were possessed of a large quantity of tin which was stored at Larut last month, and was marked with the respective chops of the proprietors, *Chin Lee* and *Wah Eng*; that they were informed and believed that this tin had been stolen and carried away by one Ismail at Larut who had placed a portion of it on board a vessel commanded by one Ma-

homed, and sent it to Teloh Serah in Larut, where it was resmelted and the marks obliterated by the direction of Mahomed. The Information went on to state that 124 of the slabs so resmelted, had been brought to Penang by Mahomed in his vessel, and were then in the harbour of Penang on board this vessel, and that if a search warrant were not granted to search for and seize the tin, that it would be sold and disposed of. It further appears from the affidavit that the search warrant was granted and the tin seized, but that the Magistrate subsequently ordered it to be released. Here then we have a crime committed in a Foreign Country by persons who are not alleged to be British Subjects, and who must, I think, be assumed to be foreigners.

By the Common law, no County Justice in the Colony, has jurisdiction to try such a crime, and there is no Statute with which I am acquainted, which confers any such jurisdiction. There are certain exceptions to the general rule, as in the case of crimes committed on the high seas by British Subjects, or in British Vessels, as also in the case of piracy *jure gentium*. There is also the Indian Act 1 of 1849, by which all British Subjects, and all Government Servants whilst actually in such service and for six months afterwards, and also all persons who shall have dwelt for six months within the territories of the East Indian Government, who shall be apprehended within the said territories shall be amenable to law for all offences committed within the territory of any foreign prince or State. But it is clear that the present case does not fall within any of these exceptions, and that as far as it appears from the Information, it is altogether out of the cognizance of the Courts of this Settlement.

Mr. Woods, in support of the motion, has contended that the Magistrate having once issued the warrant, was bound to proceed with it, and had no right to release the property. But I conceive, that if, after issuing the warrant, the Magistrate thought that it was a case in which he had no jurisdiction, he had a perfect right to decline to proceed any further in the matter. Mr. Woods further relied on the cases of *Regina* v. *Kimberley*, 2 Str. 848, and *Mure* v. *Kaye*, 4 Taunt. 43, to shew that the Magistrate has jurisdiction in the case of crimes committed in foreign Countries. But it appears to me sufficient to say that there is no analogy between those Cases and the present. In those Cases, there were persons in custody, on the charge of having committed crimes in foreign Countries, and the question was, whether they should be detained for the purpose of being handed over to the authorities of the place where the offence was cognizable. Here, there is no charge made against any one, there is no one in custody, and the question is whether the Magistrate is bound to seize the goods alleged to be the proceeds of a crime committed out of the limits of this Colony, and as to which the Courts of this Colony have no jurisdiction, on the chance of some charge or other being brought against some as yet unascertained person. I will not go so far as to say that the Magistrate would have acted illegally in seizing and detaining the goods, but I think, it is a case in which very great caution was necessary, and that he

HACKETT, J. 1872.

HO GHEE SIEW & ANOR. v. NACODAH MAHOMED.

exercised a sound discretion in declining to proceed when the question of jurisdiction was so doubtful, and the whole proceedings so vague and indefinite.

I may also remark, that Mr. Forsyth in his work on *Constitutional Law*, p. 370, throws some doubt on the case of *Mure* v. *Kaye*, 4 Taunt. 43, where the crew of a Dutch ship, having mastered the vessel and run away with her, the question arose whether the English authorities could seize them and send them to Holland, and it was held they might. Upon this case, Mr. Forsyth observes: "But I cannot understand how this could have been done without the authority of an Act of Parliament. In former times, "however, there was a laxity of practice in many things which "would not be allowed now." Recent legislation in England, has dealt with the question of Extradition, and I apprehend that now, no English Court or Magistrate would deliver an accused person to the authorities of a Foreign Power or State, without the direction of an Act of Parliament. In India also, there is the Act VII. of 1854, which provides for the apprehension within the territories under the Government of India, of persons charged with the commission of heinous offences beyond the limits of the said territories, and for delivering them up to justice. I apprehend that if it is the object of the prosecutors in this case, to apply for the extradition of any persons charged with the commission of any crime, that they should proceed under the provisions of this Act. It is true, that when a person is charged with a heinous offence under Section 21 of that Act, and his immediate apprehension may, in the opinion of the Magistrate, be necessary for the end of justice, the person accused may, without an order of Government, be apprehended and proceeded against in the same manner as for an offence charged to have been committed in the place where the person accused shall be found; and after his apprehension he shall be committed. But in the present case, there is no person charged, and the only apparent object of the Information, is to secure the goods, whereas the object of the Act is to prevent the Criminals from escaping.

Mr. Woods has also argued that it is possible that some persons may have been guilty of some offence, in connection with the alleged stealing, committed within the limits of the Settlement: when such a charge is made it will be time enough to deal with it, but in the meantime, as the information does not disclose any offence cognizable in the ordinary way by the tribunals of this Colony, I must decline to speculate on whether possibly some persons at present unascertained, may not have been guilty of some offence, undefined in connection with the alleged crime, committed within the jurisdiction of our Courts, and I must certainly decline to force that view upon the Magistrate. A case has been referred to as having lately occurred in London, where a person was charged with being in possession of certain articles, the proceeds of a larceny. [*re* Wasowsli, supra.] An application was made to the Court for his release on the ground that the larceny in question had been committed in Russia, with which Country England has no Treaty for the mutual Extradition of Criminals.

HACKETT, J. 1872.

HO GHEE SIEW & ANOR. v. NACODAH MAHOMED.

The Court however ordered the prisoner to be remanded. But this case, as it appears to me, does not prove that if the Court had thought fit to discharge the prisoner, it might not have done so. There can be no doubt that the jurisdiction of Criminal Courts is local, and only extends to crimes committed within the territorial limits assigned to them. The extradition of persons charged with the commission of crimes committed in foreign countries is a political not a judicial proceeding, and depends, as Wheaton says, on *reasons of State* and *not on rules of law*. Public Jurists are divided as to how far a State is bound to deliver up persons charged with crimes committed in another country upon the demand of a Foreign State. Some distinguished writers, such as Grotius, Heineccius, Vatteld, and Kent hold that, in the case of crimes affecting the general peace and security of society, extradition is demanded by the country whose laws have been violated, as a matter of right whilst other no less distinguished names support the opinion that extradition is a matter of imperfect obligation, and only depends on mutual comity and convenience, unless it is confined by special compact. If we may judge by the practice of nations in modern times, the latter opinion is now generally accepted, as it is not now the custom to demand the surrender of criminals except in accordance with treaty obligation.

Upon the whole case, I think the jurisdiction of the Magistrate does not sufficiently appear in the face of the Information, and that he has exercised a sound discretion in refusing to proceed further. The rule is refused.

REGINA *v.* ABDULRAHMAN & ORS.

PENANG.

SIDGREAVES, C. J. 1874.

June 1.

The appellants, some members of the red, and others, of the white flag Society, were convicted by the Magistrate, of rioting, under section 147 of the Penal Code. From the evidence, it appeared that the appellants, as members of the respective Kongsees, were having a free fight amongst themselves.

Held, the conviction could not be sustained, inasmuch as the appellants had not a common object.

The appellants were convicted by Captain D. T. Hatchell, Magistrate of Penang, of rioting under Section 147 of the Penal Code, and were severally sentenced to rigorous imprisonment, averaging from one to three months. From the evidence, it appeared that some of the appellants were members of the red flag Society, and the others of the white; and in consequence of a dispute between two members of the respective Kongsees, the appellants, as members of these respective Kongsees, turned out at Ayer Etam and had a free fight among themselves. The members of the one Society opposing and trying to do as much harm as they could to the members of the other. The appellants were all arrested on the spot by the Police, who charged all the appellants jointly, with rioting, and they were convicted by the Magistrate, as above stated. The appellants now appealed against this decision.

SIDGREAVES, C. J. 1874.

REG. v. ABDULRAHMAN & ORS.

C. W. *Rodyk*, for some of the appellants, members of the white flag Society, contended that the conviction was bad, as the appellants were members of two opposite factions and had not a common object in view. The object of the members of the one Society being, to do as much harm as possible to the members of the other. He referred to Sections 141, 146 & 147 of the Penal Code, and cited *Regina* v. *Sheik Bazu*, 8 W. R. C. R. 47, and *Regina* v. *Surroop Chundra Paul*, 12 W. R. C. R. 85.

Bond for the other appellants, members of the red flag, took the same line of argument.

D. C. *Presgrave*, for the respondent, contended that the Court would amend the conviction by charging and convicting the members of the respective Kongsees separately; that the appellants had, in fact ,a common object within the meaning of section 141, *viz.*, to fight and commit a breach of the peace, which was an "offence," section 141, cl. 3; that the cases cited were Indian decisions, and not binding on this Court.

Sidgreaves, C. J., held that the appellants had not a common object within the meaning of section 141; that the Indian decisions, though not binding on this Court, nevertheless were useful as precedents, and as they supported his view of the meaning to be put on the section, he looked upon them as authorities. The conviction would therefore be quashed.

Conviction quashed. [*a*]

[*a*] See Ordinance 4 of 1885.

LAMB *v.* PONEN & ORS.

PENANG.

FORD, J. 1874.

September 8.

The respondents were laborers, and had entered into a contract to work as such, on appellant's Estate, for 24 calendar months; six days before the contract expired, they refused to work any further, and were summoned before the Magistrate—they were summoned before the term expired, but the case was heard after the expiration of the term. They had also refused to work on various other days during the term.

Held, the Magistrate could, under the Act XIII. of 1859, order them to return and work the six days, as also for such other days as they had refused to work. [*a*]

The appellant was prosecutor before the Magistrate, W. E. Maxwell, Esq. The respondents were laborers on his Estate. They had entered into a contract with the appellant for labour, the material portions of which, will be found in the judgment. Some six days before the contract expired, the respondents struck work—on previous occasions also they had refused to work, so that they had not worked 730 days, but something less.

The Magistrate dismissed the charge, considering he had no power to order their return to work, the contract having expired.

Ross for appellant. Firstly, even allowing respondents had

[*a*] See *Lamb* v. *Kattan & ors.*, 3rd Feb., 1875, *infrà*, p. 71.

worked 724 days, the Magistrate was bound to order them to go back to work for the remaining 6 days, irrespective of the terms of the contract referring to 24 calendar months. Whether they work daily or not, they must work this period. Secondly, on the assumption of the 720 days or 24 calendar months from date not having been worked out in full, we claim—whether the period extends over the 730 days or not—that we are entitled to the services of the coolies severally for such days as they have not worked.

The respondents did not appear.

Cur. Adv. Vult.

September 23. *Ford*, J. In this case, the appellant Mr. Lamb, is the agent of Messrs. Brown and Co., and he or his principals entered into the contract for labour which I now have before me. The principal features of this contract,—to which, as I shall have to refer to them again I will briefly allude now,—are a provision for the service of the respondents as laborers with the appellant for a term of 2 years, [the appellant advancing a sum of money for their passage from India, to be repaid out of the wages of the laborers]; a clause which binds the laborers to work beyond the 2 years if the advance is not repaid within that period; a clause which states what proportion shall be deducted from the monthly wages to repay that advance; a further clause which binds the laborers, in case any of them leave the employment of the appellant, or be unable or unwilling to work, or be confined in the House of Correction or elsewhere for breach of the agreement, to *make good* whatever loss or labor or of money may be thereby caused; and lastly, a clause which sets out the consideration for which the labour is given.

The respondents are two batches of laborers, parties to this agreement, who severally admitted before the Magistrate their refusal to work the last 6 days of the unexpired term of their agreement, and that there were certain other days during the running of the agreement upon which, from inability or unwillingness, they did not work. The appellant, upon these facts, applied to the Magistrate for an order under Act XIII. of 1859, directing the respondents in the one case to work out the 6 days they had refused to work, and, in the other, to work out the days on which, during the earlier part of their time, they had been "unable or unwilling to work." The Magistrate declined to make the order, and I have now to determine whether his decision was correct. I may express my regret *in limine* that the Magistrate has not been represented in the argument, and that I have therefore no knowledge of the reasons by which he reached his conclusions. From another case which has been sent to the Court for its opinion, and in which a Mr. Vermont is the appellant, and the same points are raised as in this, [but in which the advance had not been paid up, and the Magistrate ordered the laborers to return to their work and continue it until the advance was repaid], I am left to the conjecture that he may possibly have considered the Act of 1859 as limiting his power to order laborers

FORD, J. 1874. LAMB v. PONEN & ORS.

to return to their work to cases in which the advance had not been paid up. It may be as well, perhaps, to say that in the opinion of the Court this would not be a proper construction of the Act, and to state the reasons which have guided the Court to this conclusion.

It is quite clear from the language of the 1st section of the Act that its provisions apply only to cases of contracts for labor upon which a sum of money has been advanced, but the section which defines the Magistrate's powers in such cases is the 2nd, and is as follows:—

"If it shall be proved to the satisfaction of the Magistrate that such "artificer, workman, or laborer has received money in advance from the "complainant on account of any work, and has wilfully and without lawful "or reasonable excuse neglected or refused to perform or get performed the "same according to the terms of his contract, the Magistrate shall, at the "option of the complainant, either order such artificer, workman, or laborer, "to repay the money advanced, or such part thereof as may seem to the "Magistrate just and proper, or order him to perform or get performed, such "work according to the terms of his contract, &c., &c."

That this section contemplates the action of a Magistrate in cases where the advance has been paid up seems to me clear; firstly, because, had it been otherwise, the section instead of describing the occasions upon which his powers were to be exercised as "where the labourer had received money from the complainant *on account* of any work," would necessarily have confined his powers to cases in which the whole consideration money had been *prepaid*; and secondly, because the whole language of the section shews that his power to order work to be done is co-extensive with the work to be performed by the terms of the contract itself. His power indeed to order the repayment or payment of money seems clearly confined to the case where the advances have not been re-paid, and where these have been paid his jurisdiction as to ordering payment of money, ceases. To put the case shortly,—when money is due, the Magistrate may order the laborer to pay; when work is to be performed, the Magistrate may order the laborer to perform the work, whether the advance has been repaid or not.

That being the construction of the Act, let us consider its operation upon the facts of the present case; and I would preface this consideration by the observation that the Court is not at liberty to consider whether the conclusion it reaches, bears hardly upon one side or the other. Its duty is only to give the proper legal construction to the words of the contract and apply the Act accordingly. The arguments which were addressed to the Court as to the hardships of any particular construction, cannot be allowed to affect its judgment upon a simple question of the meaning of language.

The first case the Court has to consider is that of the laborers, who, having agreed to work by the terms of the 1st clause of the contract for 24 calendar months from the 6th of August, 1872, struck work on the 1st of that month, refusing to work the remaining 6 days. The Magistrate although of opinion that the

men had broken their contract, declined to order the men to return to work; but, beyond what may be gathered from an expression tending to show that he thought if the full term of the contract had expired he had no jurisdiction, there are no means of ascertaining his reasons for refusing the order. If clause 1 of the contract stood alone, a very literal interpretation of its language might, perhaps, support this conclusion; but in the view I take of the case, *viz.*, that the laborers in such case are bound under Clause 3, the point does not become material. If, however, as I am informed, the summons was taken out before the 6th of August, although not heard until the 11th, the argument would clearly not be sustainable, the employer being clearly soon enough for his remedy. The decision of the case, however, seems to me to rest upon the answer to the question. Whether the case of these men and of the other class who omitted to work at an earlier period of the term for which they engaged, falls within the provisions of the 3rd Clause? Does the breach of their engagements by these two bodies of men under the stipulation that they "shall make good the loss of labour or of money" incurred by the breach, confer upon the planter a right to have his loss repaid in kind or only by money equivalent through the process of a civil action? To get the answer to this question the Court has simply to put the correct construction upon the term "to make good." The expression is no doubt not so full and consequently not so clear as it might be. It has a double meaning, readily illustrated. The case of a tenant who undertakes to make good all injury, or even wear and tear to the premises leased, during his holding affords one illustration. His undertaking is not merely to pay money for the damage to the tenement. He is bound, should the landlord require him, to make good the damage in kind, to leave him the tenement in the condition he took it. It may be that the owner as a general rule takes a sum of money as damages. That however is for his own convenience and cannot interfere with his right to specific performance if he wishes it, and can get a Court to enforce it. It is the latter difficulty, as Courts of Equity limit their enforcement of contracts for specific performance to a limited class of cases, which usually induces the party to forego their right in consideration of a pecuniary indemnity. The other class of cases, where, from inability to make good in kind, a pecuniary compensation for a breach of such an engagement is the only remedy, affords numerous illustrations. A familiar one would be a contract to make good any injury done in the use of cattle or animals hired for agricultural or other work. Mr. Webster, in his well known dictionary, gives to the term two similar significations. He defines "to make good" as—[1st] to fulfil; to accomplish; as, to make good one's word, promise, or engagement,—[2nd] to make compensation for; to supply an equivalent; as to make good a loss or damage. The way in which the expression is used in any particular clause, must be gathered from a reference to the circumstances under which it is used, the *res gestæ* of the case; from the context; from the subject matter of the contract. Here

FORD, J. 1874.

LAMB v. PONEN & ORS.

the subject matter of the contract is labor and labor only. It is what the planter goes far to seek and runs great risk to obtain. It is what the laborer comes far for, and undergoes many privations to procure. A sudden withdrawal of his labour might place the planter in a position of ruin; were it permitted, he would be at the mercy of those he has risked so much to obtain. It is, therefore, of the highest probability that expressions such as these would be used by both parties rather in the sense of making good in kind, than in making good by way of compensation in money, a form of compensation which, indeed, would practically leave the planter without remedy.

Does the context support this interpretation? I think it does. If to make good a loss of money in this clause means, as it clearly does, to make it good *in money*, upon what reasoning is the expression to make good loss of labour to be read as implying such loss is not to be made good *in labor*? There is nothing in the character of labor which in itself renders its restoration in kind, difficult or impracticable. There is nothing which I can see in the language of the clause which shows any intention that for such a loss the compensation was to be in money. It might indeed be said that as the 1st clause of the contract so clearly expresses an event under which the coolies are to work beyond the two years, *viz.*, the non-payment of the advance, a less definite expression in another part of the contract must have a less definite construction. But I think little can be based upon such an argument. Under clause 1 of the contract, if two-thirds of the gang died, the remaining third would still have to work till the advance to the whole gang had been paid off. Under clause 3, it would not be so. This clause clearly defines in what cases the laborer would have to make good the loss of labor or of money occasioned to his employers. Death is not one of these cases, and this may be the reason [if any search for a reason is necessary] why the first clause, which provides for all cases, expresses in more decisive terms the liability of the laborers to work out their lost days.

This being the view which I take of the construction of the contract,—How is the Act to be applied to a breach of its provisions? In England we have not, that I am aware of, any machinery for compelling a return to labor and the employer is left generally to his civil remedy, or to obtaining a fine through the agency of a Magistrate. But the Indian Act XIII. of 1859 seems framed for the purpose of meeting this very evil in cases where advances have been made. Its preamble recites both the evil and the inefficiency of the remedy by Civil suit. I cannot doubt but that, if the construction now put upon the term "to make good" is correct, the Magistrate ought to have ordered both these classes of men to return to their work. I have not come to this conclusion upon the question of construction without some degree of doubt, and, looking at the hardships which a stringent enforcement of all the terms of this contract might inflict upon the laborers of the appellant, I could wish that there was an opportunity of the respondents taking the opinion of the Appellate

Court. As I said, however, in the earlier part of this judgment, the hardships of the case have really no bearing upon the immediate decision. It is a case of construction of the terms used by the parties and of construction only.

I may add, although the observation is not strictly relevant to the points now determined, that the laborers will receive their 12 cents a day during the further period of their labor; and it may be well that, all situated in the position of the appellant, should understand that a lesser payment than this amount at any time would not improbably entitle the whole body of their laborers to vacate their contract. These joint and several contracts are capable of a very inhumane application, even to the extent of making one man in a hundred work out the defaults of 99 absconders. I am glad to find the appellant has intimated that he only presses in this case for an order making each man liable to work out the days he himself has made default in, and I trust this will be a general practice; but, had he chosen to press his claim further, he would probably have been successful. The case must be remitted to the Magistrate to order the respondents: 1. To work up the 6 days; 2. To work up the loss of labor occasioned to the planter by their default.

REGINA *v.* KOOMAH.

Where a person carries on the business of a public lottery, and all the proceedings therein, up to the time of declaring the winner and paying him his winnings—such as the sale of tickets, staking, &c.,—is done by means of Collectors who go from place to place in pursuit of their object—but the declaring the winner is made from a house or compound, at which the players are notified to assemble,

Held, that although the actual declaration may have been made on land which abutted from such compound upon a public street, yet such declaration is from a "place" within the meaning of Ordinance 13 of 1870.

Where a conviction was in effect under one clause of the Ordinance, but by mistake was stated to be under another,

Held, the mistake was only as to matter of form, and the Court amended the conviction by striking out the incorrect clause, and inserting the proper one.

The prisoner was convicted by Captain D. T. Hatchell, Magistrate, under Ord. 13 of 1870, "for having the care and management of a *Wha Whey* lottery." The way the lottery was carried on, and the facts of the case, sufficiently appear in the judgment.

Van Someren for appellant. 1st. This is not a "place" within the meaning of the Ordinance. *Doggett* v. *Catterns*, 34 L. J. [N. S.] C. P. 46 & 159; *Bows* v. *Fenwick*, 9 L. R. C. P. 339; *Shaw* v. *Morley*, 3 L. R. Ex. 137; sub.-section 1, clauses 3 & 5 of the Ordinance apply as to exhibitions in the "place" where gambling is carried on. 2nd. The Magistrate ought to have declared this place a gaming house under section 16. He has not done so. 3rd. Before proceeding, the house at least ought to have been declared a common gaming house and this ought to have been 6 months before the prosecution. 4th. The conviction in effect is under section 3, clause 3, but concludes that the offence is punishable under clause 5.

Ross for respondent was stopped by the Court on the second and third points, and requested to address himself on the first and

FORD, J. 1874.

REG. v. KOOMAH.

fourth only. He contended that under clauses 3 & 5, no place was required, but if a place was necessary, then the house was a place, or at least it and the compound were. *Bows* v. *Fenwick*, suprà, *Shaw* v. *Morley*, suprà, *Pitts* v. *Millar*, 9 L. R. Q. B. 380, per C. J. Cockburn; *Clarke* v. *Hague*, 29 L. J. M. C. 105; *Eastwood* v. *Miller*, 9 L. R. Q. B. 440. As regarded the conviction, the Court could amend it by striking out clause 5, and substituting clause 3.

Van Someren in reply. The lottery was carried on in a public road. This is not a "place." *Case* v. *Storey*, 4 L. R. Ex. 319.

Cur. Adv. Vult.

November 14. *Ford*, J. This is an appeal from a conviction by the Magistrate of Penang of a person of the name of Koomah for an offence committed against the provisions of our Colonial Gaming Houses and Lottery Act,—Ordinance No. XIII. of 1870. The form of charge is as follows:

"For that the said Koomah on the 11th day of February, 1874, in Hutton Lane in Penang, did "have the care and management of a certain lottery there situate" and did also assist the business of the said lottery by exhibiting the winning figure, to wit, a moon in a certain lottery ticket, and thereby committed an offence punishable under section 3, para. 5, Ordinance 13 of 1870."

The facts of the case are as follows: The appellant is a person, who, sometimes at his own risk and at others in partnership with one or more persons, conducts or assists in the conducting of a certain game of chance known by the name of the Wah Weh Lottery. This game is commenced by the preparation of a certain number of papers, each of which is divided by lines into a certain number of divisions or squares, in the centre of each of which spaces is the name or symbol of some animal or other body. These papers are sent round by the manager of the lottery to such persons as he can induce to join in it, and for this purpose collectors are employed. Each player deposits so many cents upon the animal or symbol he fancies and writes his name and that of his choice at the foot of the paper in a place prepared for it. He either retains the paper himself or entrusts it to the collector until the day fixed for the declaration of the winning sign. On that day the manager of the affair makes his appearance at a place of which previous notification has been given, and the players, either in person or by the agents the collectors, appear with their papers. The manager then—it may be in a house from a compound, or perhaps on the high road—declares the winning symbol by holding it up to the assembled players, and pays usually some thirty times the amount of the stakes deposited upon it to the apparently fortunate depositor or depositors. As the lottery is not closed without a complement of many more than 30 members, a good margin is generally left for the managers' profits. On the 11th day of February last, the Police Superintendent and certain of his officers and of the witnesses either went to or were in the vicinity of a house in Hutton Lane, and saw the appellant come from the compound of this house and, from its abutment upon the high road, before a concourse of people, [and whom it is not denied were players], hold up a card with the symbol

of a moon upon it—the admitted sign of the prize number of the lottery. The appellant then returned to the house followed by the Superintendent of Police, who found several lottery papers under the pillow of a bed occupied by the appellant. Whilst this was going on, the appellant ran out of the house, rushed through the adjoining compound, and in the latter was seen to throw away a number of other papers of a similar description and which, in the absence of rebutting evidence, I must presume to have had reference to the lottery he had just declared. The prisoner was seized and taken before the Magistrate and charged with being the owner or occupier of the house in question, and using the same for the purposes of a lottery; but the ownership and occupancy being traced to the father of the appellant, the charge was dismissed and a fresh summons was issued which resulted in the present conviction—the evidence, however, shewing that the appellant did not open his lotteries in the house. The conviction in form follows *verbatim*, the words of the charge. The appellant raises two objections to this conviction. The first is, that the premises used for the purpose of this lottery are not a "place" within the meaning of the words of the Ordinance; the second, that if they are so, the offence of which the appellant has been found guilty is one within the 3rd sub-section of the 3rd section of the Ordinance and not within the 5th sub-section as declared by the conviction. On the ground of this error, as well as on the point raised by the first objection, the appellant asks that this conviction may be quashed. The form of lottery sought to be put down by this conviction, being clearly within the mischief contemplated by this Ordinance, I am glad to be able to say that in my opinion this conviction can be sustained.

The material parts of the Ordinance which the Court has to keep in mind in considering this case are: 1st., Its preamble, which recites as one of the objects of the enactment "the suppression of lotteries of a public nature or to which the public has or may have access," 2nd., Section 2, which declares every place kept or used for the business of a lottery to be a "common gaming house" within the meaning of the Ordinance; 3rd, the 3rd sub-section of section 3 under which certain penalties are imposed upon whosoever has "the care or management of or in any manner assists in the business of a *place* kept or used as aforesaid"; 4th, the 5th sub-section of the third section, under which penalties are imposed upon "whosoever declares, draws, or exhibits, expressly or otherwise the winner or winning number, ticket, lot, design, symbol or other result of any game or lottery"; and lastly section 23, which extends the meaning of the word 'place' to "boats and vessels." Whether the spot used by the appellant in this instance is a place within the meaning of the Ordinance, is certainly a question upon which, had it not been for decisions in the English Courts upon an Act [the 16 & 17 Vict. c. 119] from which this local Act is clearly framed, the Court would have felt the Graves doubt. Looking at the inferential definition of "a place" which its 2nd section gives when it proclaims such a place a "common gaming house" and to the confirmation of such a

FORD, J. 1874.

REG. v. KOOMAH.

place being necessarily of some such structure as would pass under the term house, which the insertion of a special clause extending the signification of the term to boats and vessels might be held to give, it would, I think, be difficult, but for these decisions, to have extended the definition to open spaces such as a field or compound. The English Act, however, contains a section in substance identical with the 2nd section of this Ordinance and its existence does not seem to have restrained the Courts at Westminster from putting such a construction upon the word. The cases to which I shall immediately refer, have extended the construction of this term to places which certainly had nothing of the character of a house or covered space about them. I do not think therefore, that the Court in this instance [this lottery being clearly of a public nature and within the mischief contemplated by the Ordinance] will err in following, or at least guiding its judgment by the principles of those decisions. The cases under the English Act and which have been cited to the Court, are *Doggett* v. *Catterns*, 34 L. J. C. P. 159, *Bows* v. *Fenwick*, 9 L. R. C. P. 339, *Shaw* v. *Morley*, 3 L. R. Ex. 137, and *Eastwood* v. *Miller*, 9 L. R. Q. B. 440, and the principle which I deduce from these decisions is this—that any spot of which a recognised and lawful, although temporary, appropriation is made for the purpose of carrying on the prohibited game, is a place within the meaning of the Act. [His Lordship here referred at length to the facts of the cases cited]. No doubt the case of *Doggett* v. *Catterns*,—which was the case of a man using the shade of a tree in Hyde Park as his place of betting operations,—is a case somewhat difficult to reconcile with later decisions, but the reasoning upon which that case was decided was recognised in the later cases, whether such reasoning was strictly applicable to the state of facts or not. It was the ambulatory character of the person's operations and the supposed absence of any possibility of even temporary lawful occupation, that guided the learned Judge's decisions. But in the several other cases, cited, *viz*, a bench and wooden structure on a race course; an umbrella fixed in the ground; and even an enclosure to a field, were held to give that fixedness of character to the spot which has been held to be necessary. Now the facts in this case are not quite like any of the facts in the cases cited. They partake partly of one class and partly of another. All the proceedings of this lottery up to the drawing and payment were of an ambulatory character, but the drawing and payment seem to me of a different nature. The manager has also such an occupatory interest in the soil of the compound and in the house in which he is shewn to have kept his instruments of gaming, as to make this his head-quarters for bringing the lottery to its conclusion. The people have notice to appear outside his gate; he himself appears in the compound, and from thence proclaims his sign and, doubtless, from thence would have paid the winner, had his proceedings not been interrupted. I think, therefore, the place where this game was played has a sufficient fixedness about it, and his use of it by his father's acquiescence constitutes such a lawful appropriation of it, as to

bring the case within the principles which have guided the English decisions and therefore, under the circumstances, within the provisions of the Local Ordinance. Upon the 2nd point some difficulty arises, owing to the way in which the conviction has been drawn up, it no doubt appearing on its face that the appellant has been found guilty of an offence under the 3rd sub-section, which the conviction then goes on to describe as an offence under the 5th. This error seems to have arisen from some doubt in the mind of its framer as to which of the sub-sections the offence committed most appropriately fell under, the 5th sub-section particularising as a positive offence the act which the charge and conviction treat as evidence only of an offence under the 3rd.

As the declaration of the particular clause under which a prisoner's offence comes does not seem to the Court a necessary essential to the validity of a conviction, and as the Court considers any rule requiring such additional particular directory only, the Court will in this instance exercise the large powers of amendment given to it in matters of form by the Magistrates' Appeals Acts, and orders this conviction to be amended by the substitution of the words "3rd sub-section" for the words "5th para" therein contained. Thus amended the conviction will stand good.

LAMB *v.* KATTAN & ORS.

The respondents, who were laborers on a Sugar Estate, and had entered into a contract to work for one year, were charged before the Magistrate with fraudulent breach of contract. It appeared that the contract was still unexpired, but the advances had been paid off. It also appeared that they refused to work in consequence of the appellant, their master, claiming to withhold their wages for seven weeks, after it was due, on the ground of a general custom to such effect. The contract was silent as to time of payment of wages.

Held, firstly, that there can be a fraudulent breach of contract, notwithstanding the advances had been paid off, and the Act XIII. of 1859 was applicable to such a case. *Secondly,* that the custom was neither universal, certain nor reasonable, and the laborer had "lawful and reasonable excuse," for refusing to work.

Tara Duss Bhuttacharje v. *Bhaloo Sheik,* [3 Sutherland's W. R. Cr. 69] not followed.

The respondents, who were laborers on the appellant's Estate, were charged before the Magistrate, W. E. Maxwell, Esq., with fraudulent breach of their contract under Act XIII. of 1859. The term of their contract had not expired, but the amount advanced them had been paid off. The Magistrate held that the advance having been paid off, the Act did not apply.

Ross for appellant cited *Regina* v. *Gaub Gorah Cacharee,* 8 W. R. Cr. 69; *Tara Duss Bhuttacharje* v. *Bhaloo Sheik, Ibid* 69; *Koonjobeharry Lall* v. *Rajah Doomney,* 14 W. R. Cr. 29; *Mayne on Penal Code,* 492.

The respondents did not appear.

Cur. Adv. Vult.

February 3. *Ford,* J. The respondents in this appeal are or were laborers of the appellant—the manager and part owner of an Estate in Province Wellesley, known as the Prye Estate—and on the

FORD, J. 1875.

LAMB v. KATTAN & ORS.

18th of January last were brought before the Stipendiary Magistrate at Butterworth, charged with unlawfully neglecting and refusing to perform certain work in accordance with the terms of a contract entered into by them with the appellant, and thus committing a breach thereof punishable under section 2 of Act XIII. of 1859.

This Act—after reciting the loss and inconvenience suffered from fraudulent breach of contract on the part of artificers, workmen and laborers who have received money in advance on account of work which they have contracted to perform, and the insufficiency of the Civil remedy by recovery of damages, and providing by section 1. for bringing before the Magistrate such artificers, workmen, and laborers who shall "wilfully and without lawful or reasonable excuse" neglect or refuse to perform their contract—enacts by Section 2 as follows :—

"If it shall be proved to the satisfaction of the Magistrate that such artificer, workman, or laborer has received money in advance from the complainant on account of any work, and has wilfully and without lawful or reasonable excuse neglected or refused to perform or get performed the same according to the terms of his contract, the Magistrate shall at the option of the complainant, either order such artificer, workman, or laborer to repay the money advanced, or such part thereof as may seem to the Magistrate just and proper, or order him to perform or get performed, such work according to the terms of his contract; and if such artificer, workman or laborer shall fail to comply with the said order, the Magistrate may sentence him to be imprisoned with hard labor for a term not exceeding three months, or if the order be for the repayment of a sum of money, for a term not exceeding three months or until such sum of money shall be sooner repaid; provided that no such order for the repayment of any money shall, while the same remains unsatisfied, deprive the complainant of any Civil remedy by action or otherwise which he might have had but for this Act."

The contract is in the following terms :—

"It is this day mutually agreed on between Mr. James Lamb, Manager of Prye Estate and the undersigned Kling laborers as follows" :—

"We the undersigned laborers do hereby promise and agree to work on the Prye Estate or any of Messrs. Brown & Co.'s Estates for a period of three hundred and sixty-five [365] working days each and every one of us.

"To obey diligently and to the best of our power all lawful commands of the aforesaid Manager and his subordinates and to be careful of all tools, implements, &c., entrusted to our care.

"For and in consideration for the labor to be so rendered, the said Manager on his part promise to pay unto Millmen, Battery and Firemen, wages at the rate of [15] cents of a dollar for each and every day's work, as is customary, working at night—Cane, Boatmen, Field laborers and all those able to work in the No. 1 Gang, fourteen [14] cents for each and every day's work. No. 2 Planting Gang, eleven [11] cents, and boys ten [10] cents of a dollar for each and every day's work.

"As earnest money each and every one of us on signing this Agreement have received from the said Manager an advance of three dollars; which said advance is to be deducted from the wages accruing to us.

"This Agreement to come into force from the 1st day of January, 1874."

The respondents had been for some 3 or 4 previous years in the employ of the appellant upon another Estate.

In making the above contract each received an advance of $3,

but did not severally work 365 consecutive working days from the 1st January, 1874, the date from which the contract was to run; and at the close of the year, the seven respondents were found to have respectively worked less than the term by periods varying from 35 to 94½ days.

The advances had however all been paid off.

The appellant—at what time does not clearly appear, but I assume early in January—but without having paid the men wages for the previous November and December, desired the respondents to work out the days they had respectively not worked. This they refused to do, and notwithstanding a subsequent offer on the 19th of January to pay them their wages for November, still refused, and further declined then taking their November wages unless the December wages were also paid. At the subsequent hearing before the Magistrate on the 21st, they pleaded non-payment of their wages, as a "lawful and reasonable excuse" for a breach of the contract. After hearing evidence of these facts and of an alleged custom in the Province to pay laborers of this kind 7 weeks after the expiration of the month for which they were due, and that the present defendants had not previously raised any objections to the practice, the Magistrate, following a decision of the High Court at Calcutta in the case of *Tara Duss Bhuttacharje* v. *Bhaloo Sheik* [8 Suth. W. R. Cr. 69,] and expressing his regret that, in ignorance of this dicision, he and his predecessors had hitherto applied Act XIII. of 1859, differently, held that the Act, had no application to cases in which the advance had been paid off. He was apparently also of opinion that the repayment of the advance eliminated from a breach of the contract that element of fraud which is necessary to call in the operation of the Act. Taking this view he did not think it necessary to go into the question. Whether, if the construction were otherwise, the respondents had a lawful or reasonable excuse for breaking their contract confining himself to an indication of what his opinion would probably be.

From this decision this appeal is brought.

Now that there are two requisites necessary to bring into operation the provisions of this Act, *viz.*, a contract upon which an advance has been made, and the fraudulent breach of it, cannot, I think, be disputed; but to the proposition, "that of a contract where an advance has been made and paid off there can in the nature of things be no fraudulent breach"—a proposition which certainly receives some countenance from the observations of the learned judges who decided the Indian case before mentioned—this Court is unable to assent. The Act might indeed by its language require the extra ingredient of an unworked off advance to make a breach of contract "fraudulent" within its own intent and application, and whether this is so is the main point which, in this case, the Court has to determine; but the conceivable cases in which a breach subsequent to paying off an advance would be in its nature fraudulent, seems to the Court so numerous as to render the general proposition untenable. A familiar class of cases suggests itself at once in the form of contracts, well known in these Settlements, where advances of wages are made in order to enable

FORD, J. 1875.

LAMB v. KATTAN & ORS.

the laborer to pay his passage to the Colony, and which without the fulfilment of the contract in the particular of duration, no employer would enter into. Another illustration would be afforded by a combination of laborers refusing to do the work they contract to do, at a time of year, when, from the particular nature of the crop, the employer would in the dearth of the labor market, either lose his crop or be absolutely at their mercy as to the cost at which he should get it in. Can it be said that the attempt to use the employer's capital, for the purpose only of securing to himself a passage to the country of import in the one case, or a combination to drive the employer to give him higher wages in the other, by a wilful breach of the deliberate obligation to work for a period of time which would keep the employer safe against such contingencies is not a fraudulent breach of the contract? I am unable to see to what breach of contract the term fraudulent is more applicable. The fact of the existence of an unpaid advance would indeed make the fraud grosser, but I am unable to apprehend the reasoning which makes the fulfilment of one part of the contract by repayment eliminate altogether fraud from a breach of the rest. The "lawful or reasonable excuse" seems to be the true test of fraud and the one to apply to every term of the contract. Indeed, it would probably be correct to trace the element of fraud in all breaches of contract between employers and certain classes of workmen where the breach is by the workman without lawful or reasonable excuse, for I need hardly call attention to the existence of exceptional legislation by which, even in England, certain classes of workmen are made liable in the form of fines and imprisonment for breaches of contract where no element of an advance comes in. I do not understand any basis upon which this special legislation against a class, can rest except on that of an element of fraud in the acts of a person breaking, without lawful or reasonable excuse, a contract, for the breach of which he knows, from his own position of pecuniary immunity, his master can never obtain any proper satisfaction. For reasons it is not necessary to search for, for it may be that the term "fraudulent" breach is not found in the preambles of the Acts imposing these exceptional liabilities, but that it is in the existence of this element that the Magistrate either consciously or unconsciously acts, seems to me indisputable; neither is this underlying truth in substance affected by the circumstance, that the Magistrate is obliged to give the offender a certain *locus penitentiæ* by making a previous order to work or imposition of a fine and, upon disobedience to this order only, one of imprisonment. This indeed is the course of procedure rendered necessary in the Indian Act now under consideration, which in terms is applicable to breaches of contract of a "fraudulent" class.

Leaving this general question, and turning to the construction of the Act itself—which has, at least, by express provision, added the element of an advance as a necessary ingredient in the circumstances from which a fraudulent breach to be inferred, the Court has to consider, 1st; Whether the words of the Act have

imited its operation to cases in which not only has there been an advance, but to cases only where such advances or some portion thereof are still unpaid, and, 2nd, whether, if the Court is of opinion the Act is not so limited, the respondents have shown lawful or reasonable cause for the breaches they have committed.

Upon the first of these questions, I am clearly of opinion the language of the Act does not so limit its operation, and that its language is inconsistent with such a limitation. Except by the process of arbitrarily narrowing the term fraudulent in the way I have before condemned, there is certainly nothing in the title, preamble or other clauses of the Act which would lead to such inference, and, if it be found at all, it would be—as seems to have been thought by Mr. Justice Hobhouse in the case of *Bhuttacharje v. Bhaloo Sheik*—in the words of the 2nd section. By that Section there are two things which the complainant is required to do. He is [1] to prove the advance of the money; [2] to show a wilful breach without lawful or reasonable excuse. Upon this the Magistrate is to act. The complainant is not called upon to prove that the advance has not *been paid off*. The words of the Act make his part done when he has proved it has been "received on account of" any work. The Magistrate upon this is to do one of two things. He is to order the laborer to pay the money advanced or so much that as he may think fit, or to order him to perform or get performed the work *according to the contract*. This alternative power is certainly treated by the learned Judge in the case before mentioned, as indicative of an intention to confine the action of the Magistrate to cases where money is actually due by the employer, but the clause seems to me quite consistently to meet either state of facts—if there is a subsisting advance, he might in his discretion either order its repayment or a return to work, or if the advance is paid off a return to work only. That this is its true construction seems to me clear when we come to apply the other language of the Section to cases upon the hypothesis that it applies only to those where the advance has been paid off. Upon this hypothesis we are at once met by a double and undoubted inconsistency, for to sustain it, the complainant is forced to prove what the Act does not require of him, *viz.*, the existence of an unpaid-off advance; and the Magistrate is told to do at his instance that which he could not do, *viz.*, to order the laborer to perform or get the work performed *according to the contract*. Now, to enable the Magistrate to fulfil this latter injunction, he must first eliminate from the contract one of its most important features, *viz.*, the time of its duration. He could in fact only order so much of the contract to be fulfilled as consisted in working off the advance—that is not a performance of the work according to the contract, but a part performance only of the work stipulated for, similar in kind, perhaps, but wholly different in quantity. Such a construction would in the judgment of the Court not give proper effect to the words of the Act in one instance, whilst it would extend, what is required by them in another. Upon these grounds, the Court cannot concur in the construction contended

, and must hold the Act to be applicable to fraudulent breaches

FORD, J. 1875.

LAMB v. KATTAN & ORS.

of contract upon which advances have been made, irrespective of the circumstance of the advance being paid off or otherwise.

The only authority quite in point is the Indian case before named and, which, although not binding upon this Court, would as a judgment of the highest Indian Court, command a careful attention and calls for some observation. Whilst expressing my concurrence in that decision, so far as it rests upon the absence of fraud, I am unable to concur with the reasoning upon which the learned Judges therein further determined that Act XIII. of 1859 applied only to cases where advances had not been worked off. The case was one similar to this now before me, and one in which a sum of money was due to the laborer at the time when he refused to continue working, differing only in the circumstances of there being no allegation, as in this case, of a custom authorizing the employer to retain wages of the laborer after they became legally due. The language of the Act does not seem to have received any very careful attention, the only allusion to its language being by Mr. Justice Hobhouse, who expresses his opinion that the penalties imposed under Section 2, show that the case does not come within the terms of the Act "for the Magistrate is either to cause the money advanced or any part of it to be repaid or he is to direct the laborer to perform or get performed the work." I have already observed upon what, I think, the true view of this clause, and it is further to be noted that the words "according to the contract" do not appear to have caught Mr. Justice Hobhouse's attention.

In so far as the judgment of Mr. Justice Jackson confirms this construction of the Act, his reasoning seems to rest upon considerations foreign to its language.

He says:

"If such a case come within the Act, a man might be bound, upon an "advance of one rupee, to work for 20 years; and although the Magistrate "might probably not enforce the contract, still the complaint would be cog-"nizable, and the Magistrate would probably be bound to issue his warrant or "summons, and the knowledge that the Act might be applied in such a case, "would have the effect in many instances of reducing the workman to some-"thing like bondage. I therefore concur with my brother Hobhouse in hold-"ing that the Joint Magistrate was right in refusing to entertain this com-"plaint."

No doubt in the construction of Acts of Parliament reasoning *ab inconvenienti*, as it is called, is one method of reaching the true sense when the effect of language is in doubt. But even upon the admission of uncertainty in the language here, no such results as those anticipated by that learned Judge, are to be feared in these Settlements from the construction he deprecates.

The mere knowledge that the Act *might* be applied in such a sense would certainly not reduce our laboring classes here to anything like a state of bondage, their fears of appearing before a Magistrate to try their Masters' claims not being so great here as to make that condition seem preferable in their eyes. But on the further conceded assumption that this could be shewn to be other-

wise, such an application of the argument from inconvenience, it seems to me, would be carrying this rule of construction to a length far beyond what any authorities justify, and to a length which would land us into speculations so vague and uncertain as to make the rule well nigh too dangerous for application. The danger indicated of such contracts as these creating a state of bondage, seems indeed to meet its refutation in the observations of the same learned Judge, for, as is pointed out, if the contract were in effect one which amounted to something like bondage, "the Magistrate might probably not enforce it," or, in other words, he would deem the breach not a fraudulent one, and, exercising the discretion imposed upon him by the Act, would leave the employer to his civil remedy.

We now reach the 2nd point in this case and one upon which I have bestowed a very anxious attention, *viz.*, whether the respondents have committed a fraudulent breach of the contract or in other words have refused to go to work wilfully and without lawful or reasonable excuse. The facts of the case are not disputed. There were 2 months' wages due to the respondents at the time of their refusal and the appellant claimed a right to retain each month's wages for weeks from the time they fell due. In the absence of some term in the contract which shall authorize such a detention of money; or some custom binding upon them to submit to, or some conduct upon their part which shall by long acquiescence and consent have established a right in the employer to make such detention, I am compelled to say that the respondents declining to work does not seem to me a fraudulent breach of their contract. Any such right the Court is quite unable to gather from the terms of the contract which is silent entirely upon the subject of when wages are to be paid. In this silence and with the well established custom both in the planters' estates and throughout the Settlement of paying labor of this kind monthly, such would be the condition imported into the contract upon that point—probably with the additional requisite of a few days for making up the various accounts of the men. On a careful study of the evidence given to prove a special and binding custom to pay wages to coolies, [whether old or new, under a first or a second agreement,] 6 & 7 or 8 weeks after they are due, I am unable to reach the conclusion that such custom is established. To establish such a custom, there must, amongst other things, be shewn to be a universality of practice over the area or amongst the class in which it is to operate. It must also be certain and it must be reasonable. The evidence shows that although the practice does prevail on many planters' estates, it is not universal even amongst that class of property, and it is probably little, or almost unknown amongst the general run of employers of this class of labor.

The alleged custom is itself uncertain in several of its features. In some of the estates, the practice is to pay 6 weeks, in some 7 weeks after the wages are due, and in others it prevails only amongst what are called old Coolies, whilst in some amongst both old and new. I should hesitate indeed to call it a reasonable

FORD, J. 1875.

LAMB v. KATTAN & ORS.

practice, for it obviously works very hardly upon the laborer, and it is not difficult to see how the difficulties in which it may place him, give the master an instrument of pressure upon him, beyond the master's legal rights, and which might go far to deprive the laborer of any real freedom of action.

I am unable also to come to any other conclusion, but that the acquiescence of the respondents in the practice, does not destroy their legal right to secure their wages when they become due. It is not the part of a Court of Justice to weigh with nice distinctions the moral blame which may attach to a person acquiescing in an infringement of his rights and then suddenly, perhaps, and it may be even ungratefully, asserting them to the annoyance and inconvenience of his employer. The question for such a tribunal is : Is or is not the person acting within his legal rights in what he has done ? Acquiescence in the deprivation of a right, must certainly be of a very much longer period and in other relationships than exist between the appellant and respondents in this case, before the Court could hold it to be lost. I am led therefore to the conclusion that the respondents had lawful and reasonable excuse for the breaches they have committed, so far as to free them from the special penalties imposed by Act XIII. of 1859; and that, for the injuries he may have received by such breaches, the appellant must be left to his civil remedy.

The Magistrate's decision must therefore be affirmed, although the grounds upon which it is based are held to be erroneous, and the law is restored on the question of the extent of the operation of the Act discussed, to what it has hitherto been held to be in these Settlements.

As this decision may probably in its effects reach beyond the immediate case before the Court, I think it only right to call attention to another objection which might have been raised to the Magistrate's action in this case. The contract itself must, I think, be read as an agreement to work for 365 consecutive days from the 1st of January last. The time this contract having expired, the question might arise as was pointed out in the case of *Lamb* v. *Ponen & ors.* [*a*] [but which in that case was held avoided by the express undertaking of the laborers, to "make good" all losses from not working their full number of days]—whether the power of the Magistrate was not exhausted, there being nothing more in the contract for his order to operate upon. The insertion of a clause similar to that in *Lamb* v. *Ponen & ors.* would be at least a wise precaution to take, and I need hardly add that a special agreement as to *time* of payment of wages, might avoid the somewhat unsatisfactory result of this appeal.

[*a*] *ante* p. 62.

VERSAY *v.* MAHOMED HANIFF.

After the case for the defence has been closed, evidence in reply, which corroborates the case for the prosecution is inadmissible: but if the evidence is immaterial, by reason of there being sufficient evidence to convict, apart from the evidence so wrongfully admitted, the irregularity is cured by section 57 of Act II of 1855, and the conviction will be upheld.

Act II of 1855, sec. 57, applies to convictions by Magistrates.

PENANG.
FORD, J.
1875.
February 5.

The appellant Versay, had been convicted of theft by Captain D. T. Hatchell, Magistrate. On the conclusion of the defence, the Magistrate had allowed evidence to be gone into in reply to the evidence for the defence. This evidence corroborated the case for the prosecution.

Van Someren for appellant, contended that the conviction was bad on the ground that the Magistrate had allowed evidence to be called in reply, which not only rebutted the evidence for the defence, but corroborated the prosecutor's case, after the case for the defence had closed. As to the inadmissibility of such evidence, he relied on *Regina* v. *Hilditch*, 5 C. & P. 299, and *Jacobs* v. *Tarleton*, 11 Q. B. 421, and even if the evidence was immaterially corroborative of plaintiff's case, it still vitiated the proceedings. *Baily* v. *Haines*, 19 L. J. Q. B. [N. S.] 73. He contended further, that the evidence being inadmissible, the admission of it made the conviction bad. *Regina* v. *Fuidge*, 33 L. J. M. C. 74. He also referred to Act II. of 1855, sec. 57, but submitted it did not apply to Magistrates' convictions.

Ford, J. affirmed the conviction, holding that although the evidence was improperly admitted, yet the irregularity was cured by Act II of 1855, sec. 57. [*a*]

Conviction affirmed.

[*a*] The following is the Section. "The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

HAJI SAHID *v.* SHAIK PEROO.

A partner who dishonestly misappropriates part of the partnership property, is liable to be punished criminally under section 403 of the Penal Code.

PENANG.
FORD, J.
1875.
December 5.

The appellant Haji Sahid, was prosecutor before W. E. Maxwell, Esq., Magistrate of Province Wellesley, in a charge of criminal breach of trust against the respondent. It appearing in evidence that the respondent was a partner of the appellant, the Magistrate dismissed the charge.

Thomas for appellant. The Magistrate ought not to have dismissed this case. The offence committed, was a "dishonest misappropriation of property" or a "criminal breach of trust," section 403, illustration c., and section 405. *In re* Lal Chand Roy, 9 W.

FORD, J. 1875.

HAJI SAHID v. SHAIK PEROO.

R. C. R. 37, and *Kenealy's Penal Code*, comments on section 405. *Bond* for respondent. One partner cannot bring a criminal action against another, *Lindley on partnership*, 718. Until there is some Statute enabling one partner to prosecute criminally another, for wrongful dealing with partnership property, one partner cannot sue another, *Regina* v. *Evans*, 9 Cox. C. C. 238, s. c. 32 L. J. M. C. 38. A partner would not be included under the terms of the Code, unless so named.

Cur. Adv. Vult.

5th February, 1876. *Ford*, J. In this case, one Shaik Peroo was charged with dishonest misappropriation of property and criminal breach of trust. The charges are in the following terms :—

1. That Shaik Peroo, on or about the 22nd March, 1874, at Permatang Bertam, Province Wellesley, did dishonestly misappropriate to his own use, certain moveable property, to wit, 33 bags of betel-nuts, in breach of section 403 of the Penal Code.

2. That Shaik Peroo, on or about the 22nd March, 1874, at Permatang Bertam, Province Wellesley, being entrusted with property, to wit, 33 bags of betel-nuts, did dishonestly misappropriate and convert to his own use, that property, in violation of an implied legal contract which he had made touching the discharge of such trust, in breach of section 405 of the Penal Code.

The sections of the Penal Code, and the illustrations material to the case, are as follows :—

403. Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

Illustration [*c*]. A. and B. being joint owners of a horse, A. takes the horse out of B's possession, intending to use it. Here, as A. has a right to use the horse, he does not dishonestly misappropriate it. But if A. sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

405. Whoever, being in any manner entrusted with property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits " criminal breach of trust."

The facts of the case as sworn to by the prosecutor and his witnesses, and which are to be taken as true for the purposes of this appeal, are as follows :

Towards the latter part of the year 1873, the appellant, the respondent, and two others, entered into a partnership for renting a certain number of betel-nut trees at Permatang Bertam, and in order to enable them to work this part of the plantation efficiently, they conjointly agreed to borrow the sum of $95 from one Sessmalli. This sum was to be repaid to him, when the nuts became fit for plucking, in the form of 100 piculs of such nuts. The respondents' share of responsibility was to be $50 out of the $95, and I assume his share of the profits of the partnership

adventure, were to be in that proportion. When the nuts became ripe, the respondent came to the appellant, telling him that Sessmalli now wanted his nuts in payment of his advance, and the appellant delivered to him 8 bags of the nuts for the explained and expressed purpose of delivery to Sessmalli in part payment of his debt. Two further deliveries of nuts were made to the respondent upon the same footing and for the purpose of completing the payment, making in all a delivery of 33 bags. The respondent never delivered any of these nuts to Sessmalli; he applied a portion of them in payment of a debt he owed to a son-in-law of Sessmalli, and the rest, he sold, applying the proceeds to his own use. An action was brought in the Supreme Court by Sessmalli against the appellant for a breach of his contract to deliver these nuts, in which he recovered damages.

Upon these facts, Mr. Bond, the Counsel for the accused, contended that as the case for the prosecution admitted a partnership between the parties, his client was entitled to a discharge, a co-partner not being criminally liable for his dealings with partnership property. So strong did he consider the force of the reasoning upon which the English law [previous to the recent Act of 31 & 32, Vict., c. 116, making partners criminally liable, and which, it is admitted, is not in force in this Colony], had established this doctrine, that he urged upon the Court that no general language however comprehensive could embrace such a case, but it required words, in terms mentioning the case of partners, to override the effect of that reasoning. The Magistrate, after a careful consideration of the case, upon this reasoning and on the authority of an Indian case [*In re* Lal Chand Roy, 9 W. R. C. R. 37], and the English authorities as to the criminal liability of partners previous to the passing of the 31 & 32 Vict., c. 116, held the respondent not liable on either of the charges preferred against him, and dismissed the case.

The point raised is one of considerable importance to a community where small and *pro hâc vice* partnership adventures are so general as in these Settlements. In taking a somewhat bolder view of the operation of at least one of these sections of the Penal Code than the Court below has done, the Court will give the honest members of these partnerships, a security for the good conduct of members, otherwise disposed to which in good sense they seem entitled.

Dealing first with the English law, and the reasoning upon which it has been sustained, there is no doubt, that previous to the Act of Parliament before referred to, partners were not liable for larceny or embezzlement of partnership property. But when the reasoning upon which these decisions were based, is submitted to the Court as so irrefutable, that nothing but the express overriding words of a legislative enactment can affect it, it becomes desirable to consider carefully what the value of this reasoning was. The general form of putting the argument was, that as every partner had a legal property in all the partnership property and a right of possession to it also, the property was in fact the property of each partner, and, being therefore his own, no partner

FORD, J. 1875.

HAJI SAHID v. SHAIK PEROO.

could feloniously steal or take away any part of it. This relationship of partners to partnership property was drawn from a supposed analogy to the case of joint tenants of real estate. But a more careful analysis of the rights and interests of partners in and over partnership property would, I think, have shewn, that, whatever the similarity, no real analogy existed between these relationships, and have afforded a fresh illustration of the danger of too hastily importing principles and rules as to ownership of property which are founded upon tenure, to illustrate relationships in respect of a different class of property, the rights and interests in which rest on a different foundation.

The statement that a partner in a particular adventure has a joint ownership analogous to that of a joint tenant in real state, so that he has a legal property in the whole analogous to the legal seizin *per mie et per tout* of the joint tenant, will not, I think, bear the test of careful enquiry. His true interest would seem rather to be a legal property or ownership in his own share only, with certain rights of separating it from the common stock within the terms of the partnership agreement, and certain *powers* of dealing with his partner's shares for partnership purposes. There is no relationship in the forms of ownership of real estate, perhaps, strictly analogous, but with reference to the shares of his partners, he may be said to bear some similarity, so far as his power over these are concerned, to that of a trustee in strict settlement from whom the "legal estate"—the corresponding word to "legal property" in personal estate—is carefully excluded; a limited dominion over the property in that instance being given by express powers—in the case of partnerships being implied from the nature of the contract of partnership. The powers which one partner has, *e. g.*, of sale, exchange, and dealing generally with partnership property, do not find any analogous place in the rights of a mere joint tenant of real estate or joint owner in personality, and it would be superfluous to do more than point out in the case of partnership property that non-existence of a right of survivorship which is so remarkable an incident in a joint tenancy or joint ownership of other property. It does not seem therefore correct to say, that one partner is necessarily the legal owner or has a legal property in all parts of the partnership property, however strongly the use of a mistaken analogy has imprinted such a doctrine in our text books or even in decided cases. This view derives strong confirmation from the practical action which the English Parliament has taken in the matter by the Statute before referred to,—a Statute which does make partners liable for acts, which, this argument maintains, in reason they never can be. It would be going far indeed, to say that, by overriding by positive enactment the law which, popularly speaking, enabled one partner to run off with the till with impunity, the legislature had violated those principles which have ever guided its action. *Cessante ratione cessat lex*, that even "Parliament cannot enact laws contrary to reason" are still maxims to which the legislature pays attention. The legislature seems to me rather to have said, and rightly to

have said, this reasoning is not sound, and we therefore take down the fabric which has been built upon it.

A bare right of possession, it may be remembered, never did entirely protect the possessor from a charge of larceny even in English law—a subsequent misappropriation constituting the offence, if the possessor, when obtaining the goods, had the *animus furandi*, or, when receiving them, intended to convert them to his own use. I am not sure, therefore, that had this charge taken the form of an indictment for larceny under the old law, and not a charge of a modified offence under the Penal Code, the Court would, in the face of the comment of the 31 & 32 Vict., cap. 116, on the reasoning upon which the former immunity of partners was secured, have followed the older English decisions.

But however this might be, the Court for the reasons before given, is very clearly of opinion that those decisions were not founded upon reasoning of so irrefutable a character, that nothing but express words of allusion in a comprehensive enactment under a new Penal law, can affect dealings by partners with partnership property.

Taking this view of the question, let us consider the 1st of the charges against the respondent. The illustrations clearly demonstrate that a felonious taking was never contemplated by the framers of section 403, as necessary to the commission of the offence, and the illustration of a joint owner of a horse, selling and misappropriating the proceeds of the sale, as guilty of the offence, is a very near approximation to the express allusion to partners which has been contended for as necessary. But what can be more comprehensive than the words of the section itself: "Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished, &c." Do the alleged acts of the respondent bring him within this language? I think they do so—both within its letter and its spirit. The accused in this case, upon his own application and for a specific act of appropriation, obtained from his partner a part of the partnership property—presumably with what he afterwards obtained, far beyond his own share. Upon his applications for the further part, he made the same representation, and added a statement of his having applied the first portion in the manner he previously proposed. He did not apply the nuts to such or any other partnership purpose, but to his own use and the payment of his separate debt. There was a clear misappropriation. Was it a dishonest one? Can it be that an act so manifestly deceitful and injurious to his partners is not to be termed dishonest, or that words of a section so comprehensive as the present, are to be construed as protecting him from the punishment it prescribes, upon the sort of paradoxical reasoning, that because a partner has a legal property in all the partnership property and a right of possession to it also, a misappropriation is impossible, the property being in fact his own. I am of opinion, that such a misappropriation as this case shews, was dishonest, and that such reasoning, even if tenable, cannot avail against the comprehensive words of this section and the illustration of the extent of their range which its framers fore-

FORD, J. 1875.

HAJI SAHID v. SHAIK PEROO.

shadowed by the illustration of joint owners of a horse. *A fortiori*, if, as the Court is of opinion, that reasoning is inaccurate, and is in substance condemned by the subsequent action of the English legislature, does this section embrace the offence, which upon these papers, the respondent is said to have committed. With reference to the charge under section 405, the Court inclines to the opinion, that the offence committed does not amount to a criminal breach of trust as defined by that section. The section certainly seems to contemplate an offence by a person having no beneficial interest in the property misappropriated, and when the relationship or trustee, and *cestui que trust* exists in its simple integrity. As there is a decision in the Indian Courts [*a*], to the effect that the case of a partner does not fall within the 405th section, and as the justice of the case will be met by the application of the 403rd section, I do not propose to interfere with the decision of the Magistrate upon the charge of criminal breach of trust. The decision of the Magistrate under the 403rd section will be reversed.

[*a*] This case has since been overruled, and a partner held liable to be convicted under section 405 as well—See *Nrigendro Lall Chatterjee* v. *Okhoy Coomar Shaw*, 21 W. R, Cr. 59.

REGINA *v.* LIM PENG & ORS.

PENANG.

FORD, J. 1876.

January 11.

Section 62 of the Criminal Procedure Ordinance 6 of 1873, applies to Police Courts, and a Magistrate may, in the cases there referred to, convict for one offence, when the charge is for another.

The carrying on of an offensive trade, is an offence within section 268 of the Penal Code, although the trade may have been for a long while acquiesced in, or was carried on long before the persons who complain, went to reside in that neighbourhood.

The appellants were convicted by W. E. Maxwell, Esq., Magistrate of Province Wellesley, for causing a nuisance by carrying on the trade of *Blachun* making at Prye, near Butterworth. The prisoners had been charged under Section 268 of the Penal Code, the conviction purported to be under section 290.

R. C. *Woods*, jr., for appellants, objected to the conviction as not being upon the charge made against the prisoner, and contended that the Magistrate should have amended the charge and given the prisoners notice of such amendment before making the conviction. Section 62 of Ord. 6 of 1873, he submitted, had no application to Magistrates' Courts, and cited *Maxwell on Magistrates*, 45, 46.

D. *Logan* [*Solicitor-General*]. My copy is a conviction under section 268. The charge is no doubt erroneously drawn, but the Court can amend it and the adjudication, under section 14 of Ordinance 27 of 1867. It is a mere matter of form. The offence under section 268 is but a public nuisance, and section 290 so describes the offence. I am however ready to abandon the

FORD, J. 1876.

REG. v. LIM PENG & ORS.

charge under section 290, and would ask for time to contest the validity of the charge under section 268.

January 17. *Woods* was now further heard.

Ford, J. held that the Magistrate had power under the Criminal Procedure Ordinance 6 of 1873, section 62, in certain cases to convict for an offence different from that charged, and that this was one of such cases.

Woods then argued on the merits. He contended that this trade had been acquiesced in by the inhabitants of Butterworth, and was an old one; that the real prosecutor was the Magistrate who tried the case. The smells were not continuous; only with a southerly wind,—which was for a short time in the year—was there any smell. It might be a nuisance to the Europeans of Butterworth, but they did not constitute the "public" or the "people in general." The native community did not complain.

Logan. The offence under section 268 is more general than under English Law. The native community are the blachun manufacturers, and they would not therefore complain. Butterworth was the head-quarters of the Judicial and Executive authorities in the Province, and was to Province Wellesley what Northam Road was to Penang. The length of time that the trade was carried on was nothing—*Rex* v. *Cross*, 3 Camp. 224. The existence of the nuisance before the Europeans went there was also no excuse—*Mayne's Penal Code*, 891, 892; *Archbold's C. P.* 891, 892; *Bamford* v. *Turnley*, 31 L. J. Q. B. [N. S.] 286; —the unhealthiness of the smells was not necessary to constitute a nuisance—*Rex* v. *White*, 1 *Bur.* 333; *Mayne's Penal Code*, 215, 216.

Ford, J. affirmed the conviction, but considered the circumstances of the case were such that the fines should be reduced to $10 on each defendant. [*a*]

Order accordingly.

[*a*] It is doubtful whether the Court of Appeal has now any power to reduce a fine, except it be larger than that which could legally be awarded—see section 34, cl. 1, Appeals Ordinance 12 of 1879.—To increase the fine, it is presumed it has not. J. W. N. K.

MUNICIPAL COMMISSIONERS *v.* AH CHIN.

PENANG.

PHILLIPPO, J. 1876.

June 8.

The Magistrate, on convicting a person under section 290 of the Penal Code, has no power to order the discontinuing of the nuisance.

The appellant was the proprietor of a tannery and slaughter-house at Burmah Road, Penang, having in 1865 and 1868, obtained licenses for the purposes of his aforesaid business, from the respondents, under section 91 of the Act XIV. of 1856, but not for the present year. He was charged under section 290 of the Penal Code, for creating a public nuisance. The evidence shewed that bad smells proceeded from the appellant's premises, to the annoyance and discomfort of the neighbours around him. The

PHILLIPPO, J. 1876.

MUNICIPAL COMMISSIONERS v. AH CHIN.

Magistrate, Captain D. T. Hatchell, convicted the appellant, and fined him $1, ordering him at the same time to "discontinue the "business of a tannery and slaughter-house in his premises in "Burmah Road within one month from this date." The appellant appealed against this conviction and order.

Thomas for the appellant contended that the Magistrate had no jurisdiction to order him to discontinue—but the procedure should have been under Ordinance 12 of 1872, and referred to sections 47, 49 & 50.

Ross for respondent, referred to sections 290 & 291 of the Penal Code, and section 46 of the Ordinance 13 of 1872, and contended that what the Magistrate did, was practically what was directed by the latter section, and that the conviction was "a written order" within that section.

Phillippo, J. held the Magistrate had no power to abate the nuisance complained of, and quashed that portion of his order, directing the business to be discontinued, but affirmed the fine.

Order accordingly.

TUAN PUTEH *v.* DRAGON.

PENANG.

PHILLIPPO, J. 1876.

November 24.

A cheque, payable to order, but not endorsed by the payee, is "moveable property" within the meaning of the Penal Code.

The words of section 403 being "misappropriates or converts," it is not necessary, in order to bring a person within that section, to shew he converted the property—it is sufficient if he appropriates the same, and such appropriation is wrongful.

The prisoner was convicted by Captain D. T. Hatchell, Magistrate, of criminal misappropriation of property, to wit, a cheque. The cheque was drawn by the Assistant Treasurer in favor of Captain Strong, Superintendent of Police, Penang, or order, on the Chartered Mercantile Bank. The cheque was handed by the Treasurer to the respondent William Dragon, who suddenly missed it. The cheque had not been endorsed by Captain Strong—It was traced to the prisoner who admitted he had it and produced it. On the back was something written, purporting to be in English, but was unintelligible. It was suggested by the respondent that it was intended to be Captain Strong's signature, but there was not the slightest resemblance thereto. From the evidence, it appeared that the prisoner took the cheque to the Bank and handed it to the Cashier. It was not cashed however, as the Cashier said that being payable to order, he required Captain Strong's signature. This was somewhat late in the day, and the prisoner on getting back the cheque, took it home and put it away, until his arrest as aforesaid on the morning of the following day. The prisoner alleged that he found the cheque on the steps of the Police Court, and not knowing what it was, had taken it to the Cashier to find out who it belonged to, and intended taking it to Captain Strong, when he was arrested. The writing at the back he denied all knowledge

of, and alleged it was on the cheque when he found it. There was no evidence to shew how the writing on the cheque came to be there.

Van Someren for appellant. *1st.* The cheque was found at the foot of the steps of the Police Court. It is payable to "order" but is not signed by Captain Strong. The words in section 403 of the Penal Code are "misappropriates or converts," and the illustration 1 & 2 shew there must be an actual conversion. *Mayne on the Penal Code*, 325, and *Reg.* v. *Abdool*, 10 W. R. Cr. 23. That case is with reference to a bond. The Court held there was no conversion as there was "no attempt to realize the bond." It is quite true the prisoner went to the Bank, but he gives an explanation of this, and there is no reliable evidence to contradict his statement. There is no evidence of a conversion to bring the prisoner within the section. The cheque is dated the 24th, and was lost the same day, it remained in possession of prisoner up to the morning of the 25th. It does not appear he went to the Bank on the 25th—he went on the 24th, the day the cheque was lost—but early on the 25th, the first time he meets the Police, he tells the Sergeant-Major he has the cheque and takes him to the house and produces the cheque. There was no reasonable time allowed him to restore the cheque as he intended, and no evidence of conversion is to be gathered from the fact of his keeping possession of it for the one night. *In re* Enayet Hossein, 11 W. R. Cr. 1. *2nd.* The cheque was not moveable property within the meaning of the Code. Moveable property is defined in section 22. In the case of *Regina* v. *Abdool*, before cited, the Court had doubts as to the bond being moveable property. The cheque until endorsed by Captain Strong was not "property"—it was mere waste paper. *3rd.* As to jurisdiction. The Magistrate had no summary jurisdiction under section 403—that offence is triable by the Quarter Sessions under Ordinance 13 of 1872.

Ross for respondent. The 3rd objection first. Sub-section 5, section 2 of Ordinance 13 of 1872, gives the Magistrate power to try for offences under section 403, if he thinks punishment adequate. *2nd.* The cheque was moveable property as distinguished from corporeal property. *Reg.* v. *Girdhar Dharamdas*, 6 Bom. H. C. Rep. Cr. 33. *3rd.* The appellant assumes misappropriation and conversion are the same thing, but there may be an appropriation without a conversion. *O'Kenealy on the Penal Code*, 237, citing *In re Enayet Hossein*, suprà. It is submitted there are no grounds for this appeal and the conviction should be affirmed.

Phillippo, J. held, that the cheque although not endorsed, was "moveable property" within the Code, that a conversion was not necessary, as the words of section 403 are "misappropriates or converts," that the prisoner had clearly appropriated the cheque, which was wrongful, and a sufficient misappropriation within the section.

Conviction affirmed with costs.

MAHOMED ANIFF *v.* EBRAM KHAN.

PENANG.

PHILLIPPO, J. 1876.

November 27.

The wounding of an animal, though slight, is a sufficient change therein to diminish its value as to make the act "mischief" within section 426 of the Penal Code.

A conviction which awards costs, must shew the amount thereof, otherwise the conviction will be bad.

Query. Has the Magistrate power to award costs in cases of conviction for offences under the Penal Code [*a*].

The appellant had been convicted by Captain D. T. Hatchell, Magistrate, of mischief, under section 426 of the Penal Code. The evidence on the part of the prosecutor was, that his cow having strayed into the appellant's compound, he had stabbed the animal on the shoulder with a bayonet fixed to a pole. The wound was a small one, and the animal got well in a few days. The appellant's evidence was to the effect that the charge was a false one, and the whole evidence the result of conspiracy and spite on the part of prosecutor and his witnesses.

Van Someren for appellant cited *Mount* v. *Selwood*, 1 Q. B. 726, and *Maxwell on Magistrates*, 31.

The respondent did not appear.

Cur. Adv. Vult.

November 30. *Phillippo*, J. In this case Mr. Van Someren appeared for the appellant. The respondent was not represented. Mahomed Aniff, the appellant, was convicted of mischief by stabbing a cow, under section 426 of the Penal Code, and fined twenty-five dollars and costs.

The objections taken by Mr. Van Someren were, first, that the conviction under section 426 was bad, no evidence of mischief under that section, having been given, as the cow was wounded but not otherwise injured.

The 425th section defines the offence. In order to bring this offence within the scope of that section it must be proved that a change has taken place in the property which would diminish its value. The first explanation of the section, however, taken together with sections 428 & 429 would seem to imply that the wounding of any animal caused a change in the property which diminished its value or utility or affected it injuriously. I think it clear from sections 428 & 429, that poisoning or maiming animals is such a change of the property as is referred to under that section, and if so, it would seem that the wounding an animal would equally be such a change in the property as therein referred to. I am of opinion therefore that the evidence brings this case within the section upon which the appellant has been charged, as explained by subsequent sections, and I do not hold this objection good.

The second objection was, that the evidence was in favor of the defendant. I think cases such as this, are those in which the Magistrate is best able to judge, and I am unwilling to return a

[*a*]. See *Mun. Comers.* v. *Chuah Seng & ors.*, 23rd May, 1882, *infrà*.

case to the Magistrate solely on the grounds that the conclusions I drew from the evidence are not in accordance with those of the Magistrate; there is however a third objection as to costs. Whether the Magistrate is empowered to impose costs where he convicts for offences under the Penal Code, I do not at present decide. There is an Indian Act empowering the Magistrate to grant costs in certain cases, [a] and it may be that it applies to cases under the Penal Code. I am clearly however of opinion, that the amount of costs ought to be stated in order that the defendant may know definitely the amount he has to pay. The conviction on this point therefore cannot be sustained. As this is a case in which I have considerable doubts upon the evidence, as to whether the appellant was guilty of the charge brought against him, the conviction will be quashed, but the case must be referred back to the Magistrate for rehearing, in order that he may have an opportunity of reconsidering his decision. The fine, if paid by defendant, to remain in Court till the Magistrate's decision on rehearing is given.

Order accordingly.

[a] Act XIII. of 1856, s. 102.

REGINA *v.* CHENG HEE.

PENANG. PHILLIPPO J. 1876. November 27.

Where prisoners were convicted of being members of an unlawful assembly under section 144 of the Penal Code, but the evidence shewed that they were having a fight among themselves,

Held, they had no common object, and the conviction was set aside, and the case remitted to the Magistrate for rehearing on a fresh charge for assault or such other offence.

Semble. It is inconsistent, and open to serious objection, that a person who is Assistant Superintendent of Police and receives reports of cases as such, should act as Magistrate and afterwards try the same cases.

The facts appear from the judgment.
Duke appeared for the appellant.
No one appeared for the respondent.

Cur. Adv. Vult.

December 1. *Phillippo*, J. In this case there were three grounds of objection raised.

First.—That the depositions were not in accordance with the evidence.

Second.—That there was not sufficient evidence to convict.

Third.—That the convicting Magistrate, at the time of convicting the appellant, was also holding appointment of Assistant Superintendent of Police, who in that capacity had previously investigated the case.

The first two objections were not insisted upon, and Mr. Duke relied wholly upon the 3rd and quoted several authorities.

If Captain Strong was in fact acting as Magistrate and as

PHILLIPPO, J. 1876.

REG. v. CHENG HEE.

Assistant Superintendent of Police, the two duties would seem to be inconsistent and open to serious objection. I should hardly think it possible that he would receive Reports from the Police in the same cases in which he sat as Magistrate.

In this case however it is not necessary there should be evidence on the point, as on the face of the depositions I must send the case back to the Magistrate for consideration.

The appellant, with others, was brought up and convicted under section 144 of the Penal Code. That section enacts that an unlawful assembly must consist of five or more persons having some common object such as set forth in the section.

The evidence in this case is exceedingly meagre. Only two Police Constables have been examined, and their evidence points to the conclusion that the offence, if any committed, did not amount to more than a fight between the parties in the street.

In their defence the prisoners quarrelled among themselves and with the exception of one or two, who set up an *alibi*. One party accused the other of having assaulted and beaten them and *vice versâ* ; it is clear they had no common object to bring them within the section. The appellant was also charged with using a deadly weapon, to wit a stick.

Blows are sworn to have been struck by the appellant, but there was no medical testimony nor did any body come forward even to say he was hurt. I find the stick was produced before the Magistrate, and he may have come properly to the conclusion that it was a deadly weapon within the meaning of the section upon which the appellant was convicted.

I do not however consider that the present conviction can be sustained, and the case must be sent back to the Magistrate for a rehearing on a charge for assault or such other charges as the Magistrate or Police authorities may consider will meet the requirements of the case or for such charges as the persons may think fit to bring against one another.

MOOTOO & ORS. *v.* AYAH DOREH PILLAY.

PENANG.

PHILLIPPO, J. 1876.

November 30.

Before a conviction can be had under section 504 of the Penal Code, it must be shewn that the insult was given with the intention of causing the person insulted to commit a breach of the peace.

Where therefore five men, of a night, visited the house of the prosecutor, and called him out to fight, and abused him,

Held, that as the prosecutor single-handed was not likely to go out and attack the five men, there was no evidence of such intent, and the conviction was quashed.

Query. Whether the Magistrate can, on a conviction under section 504 of the Penal Code, order the prisoner to be bound down to keep the peace ?

Query. Is an order to keep the peace bad, if it omit the alternative sentence of imprisonment under section 60 of Ordinance 13 of 1872 ?

This was an appeal from the decision of Captain D. T. Hatchell, Magistrate, Penang. The appellants [among others] were convicted by the Magistrate, of insulting, under section 504 of the Penal Code. The evidence shewed that the appellants and others went to the house of the respondent, and after enticing him out to

fight, abused and insulted him most grossly. They were fined by the Magistrate, and ordered to be bound down to keep the peace;—the order omitted the alternative that in default of furnishing the recognizance, the appellants were to be imprisoned. The charge omitted to state that the insult was given with intention to cause a breach of the peace.

Van Someren for appellants.

The respondent in person.

Cur. Adv. Vult.

Phillippo, J. In this case the appellants were convicted of intentionally insulting and thereby giving provocation under section 504 of the Penal Code.

That section requires more than this to be stated in the conviction. The section is as follows:

"Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

In this case, the last part of the section is left out in the charge and the appellants are convicted on an imperfect part of the section only. And I do not think the words used as set forth in the evidence meet the full requirements of this section.

This section can only be dealt with as a whole and the intent must be proved. The evidence in this case was to the effect that several persons went and used violent threats to the respondent at night. I do not think such language calculated to provoke a breach of the peace—as no one in his senses was going to leave his house to attack five men who were challenging him to do so. A further objection has been raised. [2]. That the Magistrate had no power of binding over to keep the peace. Under the Summary Procedure Ordinance, section 60, the Magistrate is empowered in certain cases, in addition to the punishment, to call upon the defendant to enter into a personal recognizance, those cases are "rioting, assault or other breach of the peace or with abetting the "same or with assembling armed men or taking other unlawful "measures with the evident intention of committing the same."

The appellants were not convicted on any of the cases set forth in that section of the Ordinance.

The Ordinance further makes a provision that in default of the recognizance being given, the person required to enter into the recognizance shall be kept to simple imprisonment not exceeding six months.

This was omitted to be done in the case before me, I am of opinion that this conviction cannot be sustained. By section 41, of the Appeals Ordinance 1874, sub-section II, † I have power to annul the sentence and direct the accused person to be tried again on a proper charge. It appears to me that the proper section

† Re-enacted by section 34, sub-section 2, of Ord. 12 of 1879.

PHILLIPPO, J. 1876.

MOOTOO & ORS. v. AYAH DOREH PILLAY.

upon which the appellants ought to have been tried is under section 503, punishable by 506, and not under section 504. The proceedings in this case must be annulled and the accused tried under the sections indicated. The recognizance if entered into, will of course be discharged, and this case will govern the case of the persons who have not appealed, if they choose to take advantage of this decision.

TOWERS *v.* MUSTAN & ORS.

PENANG.

PHILLIPPO, J. 1876.

November 30.

A prosecutor in a proceeding before a Magistrate, who is dissatisfied with the decision of the Magistrate may, under section 25 of the Appeals Ordinance 9 of 1874, appeal in the same way as a prisoner might. [*a*]

Where the Magistrate had decided a case on the evidence as one of simple assault, and the prosecutor was dissatisfied therewith, and contended that the evidence disclosed an assault with intent to murder, the Court refused to disturb the Magistrate's decision.

The appellant was prosecutor in a case in the Police Court in which he charged the respondents with an assault with intent to murder. The Magistrate, Captain D. T. Hatchell, convicted the respondents of a simple assault, and fined them $20 and $10 respectively. The evidence for the prosecution was, that the appellant and first named respondent, were licensed pilots ; that both had gone out off Muka Head, in the North Channel, and expected a steamer which each was desirous of piloting into harbour. The steamer had not appeared as expected, and the appellant was returning to town in his boat, when he was chased by the respondent's boat, overtaken, and he and his sampan man severely beaten with heavy sticks by the first respondent and his boatmen, the other respondents. The respondents' evidence was, that there had been an altercation between the appellant and first respondent, which led to high words and the appellant's flinging his boat's tiller at the first respondent, whereupon a fight ensued. The appellant was dissatisfied with the Magistrate's finding, and contended that they should have been convicted of an attempt to murder.

Thomas for appellant.

Ross for respondents.

Phillippo, J. In this case appellant was the prosecutor before the Magistrate and appeals to this Court on the ground that the sentence pronounced by the Magistrate on the respondents was inadequate.

The first question is whether the Ordinance gives a right of appeal in a case where a prosecutor is of opinion that the sentence is insufficient?

On looking at the Ordinance, it would appear an appeal lies on any question that arises in the Summary jurisdiction of the Magistrate's Court.

Under section 25 it is open to either party to apply to this

[*a*] Re-enacted by section 18 of Ord. 12 of 1879.

Court if dissatisfied with the determination of the Magistrate. The next question is, whether there is any ground in the present appeal for redress? It is perhaps unfortunate that there is no provision in the Appeals Ordinance that the Magistrate should, in transmitting the record to this Court, give the reasons upon which his judgment is founded.

In this case as in many others, it is difficult to come to any conclusion as to what facts the Magistrate considered proved or disproved, or what was his opinion of the Law bearing upon the case.

I do not know from the record if some witnesses were called for appellant or for the respondents.

Although not shewn on the record, I understand since I came into Court that Counsel appeared on both sides. I was of opinion that evidence had been admitted which ought not to have been received, which would have induced me to have referred back the case; but as Advocates were present before the Magistrate on both sides, and no objection appears to have been there taken by the Advocate for the prosecutor, that objection is now disposed of. The case for the prosecution was, that an unwarrantable and unjustifiable attack and assault was perpetrated upon the appellant when in the peaceful performance of his honest calling and profession: if so the punishment inflicted would appear totally inadequate.

On the other hand the defence was, that Mr. Towers first unwarrantably interfered with and provoked the respondents, and that he threw the tiller of his boat at them, and according to the statement of a witness, the respondent Mustan, immediately upon his return to shore, complained to the Police of the conduct of the appellant.

I can only suppose the Magistrate came to the conclusion that the complainant provoked the assault, that the statements of himself and of his witness were greatly exaggerated, but that there was some unjustifiable excess on the part of the respondents which called for punishment, but which was effected by the comparatively small fines of which the appellant complains. I should have been glad if I could have felt myself at liberty to have sent back the case to the Magistrate for reconsideration, but I do not think I should be justified in sending back the case to the Magistrate without hearing the evidence, upon a bare surmise that the Magistrate's decision may have been wrong, or to interfere with the sentence, and the appeal must be dismissed.

Appeal dismissed accordingly.

REGINA *v.* TAN SIN HAP & ANOR.

SINGAPORE.

FORD, AG. C. J. 1877.

May 10.

A house kept up by private subscription among members, at which they met, ate, drank, played games of "chike," dominoes, cards, &c., for money, on certain days of the week, and occasionally remained one night, was not a "common gaming house," within the Gaming Ordinance 9 of 1876.

The Statute Law of England relating to gaming, and the English Statutes declaring certain games illegal, do not extend to this Colony.

Observations on games played at Clubs, &c., and on games of skill and chance.

This was an appeal from the decision of D. F. A. Hervey, Esq., Magistrate, Singapore, under Ordinance 9 of 1876, "for the suppression of Common Gaming Houses and Lotteries."

J. D. *Vaughan* for the appellants.

T. *Braddell* [*Attorney-General*] in support of the conviction.

Cur. Adv. Vult.

On this day judgment was delivered by.

Ford, Ag. C. J. The facts of this case and which, for the purpose of the decision I am about to give, may be taken to be true, are as follows:—

On the 27th January last, Inspector Ord, having reason to believe that a house situate in Balestier Road and occupied by the defendants, apparently, however, in the relative positions of master and servant, was a common gaming house, entered the same under the customary warrant. The result of his search, which ended in his finding the house to be fitted up with sleeping and general accommodation for some 12 to 15 or 20 persons, and to contain on a part of the premises some "chike," cards and dominoes and to have some very doubtful indications of those unusual points of construction which are deemed to facilitate the escape of persons from a house when suddenly disturbed, was such as to throw upon the appellants the duty of rebutting the presumptive proof, which, under sections 13 and 14 of the Ordinance, such features supply, of the premises being used as a common gaming house. This presumption the appellants undertook to rebut by evidence, to the following effect, and which evidence, I think, gives the true character of this house, subject to one doubtful point, *viz.*,—the *not* playing for money,—which feature, however, would not, whether present or otherwise alter the view which I take of this case.

That evidence was, that this house belonged to one *Ng Kim Guan*, a merchant now gone to China, and was occupied by the first appellant in partnership with some 30 other Chinese traders and merchants, *who, in uncertain numbers, on certain days of the week, generally Wednesdays, Saturdays and Sundays,* went to this house, spending sometimes one night and day, sometimes more, there, and that during that time they amused themselves with playing music, eating and drinking, and playing with cards and at chess, but not, as alleged, for money but for stakes of drinks, ducks, and geese. That the establishment was conducted and paid for through the instrumentality of a servant who called upon

the members of the Society or Club, finding out who would dine and who would not on the customary days, and that the expenses of all that was consumed, and, as I understand, a share in the general expenditure of the house, was paid by the members, as would be the case in an ordinarily constituted Club, such as are found in these Settlements. Women and children were not unfrequently taken to the place for a holiday or change. No one received any profit out of the place or whatever was done there, except probably the cook—members paying their winnings and losings without the intervention of any Bank, Lottery Keeper, or any person managing a game of which the chances were not equal to all the players. The features of the house, which, in one particular, had certainly some *primâ facie* appearance of being used for the purpose of facilitating a sudden exit, were, satisfactorily I think, explained. The question has arisen whether a house used as just described, even if money formed part of the stakes played for, is a common gaming house within the provisions of this Ordinance.

I am not aware of any decision at Common Law, [and the Statute law of England in respect of gaming, I am clearly of opinion, does not extend to these Settlements], which has determined with distinctness what a common gaming house is, although in every case one or more of the following features seems to have been considered a necessary one, *viz.*,—that the house should be kept by some person or persons for lucre and gain, or should be one at which unlawful games were played, or, by the attendance of evil and idly disposed persons, be such an inconvenience to the neighbourhood as to be a common nuisance. And the necessary existence of at least some of these features has been confirmed by statutory enactments in England, where, to avoid the difficulty arising from houses being open to subscribers only, it was enacted by the 8 & 9 Vict., c. 109—that in default of other evidence proving any house or place to be a common gaming house, it should be sufficient to show that such house or place was kept "for playing therein an unlawful game, and that a bank is "kept there by one or more of the players exclusively of the "others, or that the chances of any game therein are not alike "favourable to all the players, including among the players the "banker or other person by whom the game is managed or against "whom the other players stake, play, or bet."

Another class of establishments known as "Betting Houses" were by 16 & 17 Vict., c. 119, brought under the description of common gaming houses within the 8 & 9 Vict., c. 109, but anything analogous to these houses is, however, unknown here.

The definition of the Act 8 & 9 Vict., read with the Common Law decisions, seems to me to form a safe rule for determining —apart from further statutory enactment—what are the features of common gaming houses, and as none of these features have been proved against the house in this case, I am of opinion it is not a common gaming house, unless made so by some special provision of Ordinance 9 of 1876 itself.

The next point for consideration is whether the Ordinance

FORD, AG. C. J. 1877.

REG. v. TAN SIN HAP & ANOR.

itself contains any provisions giving an enlarged interpretation to the term "common gaming house" so as to bring a house of this description within its operation.

The only sections which either directly or indirectly bear, I think, upon this point are the 1st & 7th sections. The first section "makes every place kept or used for the business of a lottery or for unlawful gaming" a common gaming house, but as there is no question of this house being used as a lottery, and it is admitted on both sides that there is no game or class of games made illegal by any Ordinance now in force in the Colony, and certainly there is no evidence of any game being played here of an illegal character—were even the English Statutes creating certain games illegal operative here [which Statutes I am, however, of opinion are not operative here] I do not see how this house can be brought under the terms of this section unless a legal inference can be drawn from section 7, that all games other than games of "mere skill" are illegal. That section provides "that nothing in the foregoing provisions of this Ordinance con-"tained shall be held to apply to any game of mere skill played "at Licensed Hotels, Taverns or Eating Houses or places of "public resort." I am of opinion that upon proper principles of construction, such an inference in a highly penal statute, from such a proviso as this, cannot properly be drawn, and such a view is strongly confirmed by consideration of the extraordinary inconvenience which would arise were I to hold all places not Hotels, Taverns, Eating Houses or places of public resort, were common gaming houses, if games not of "mere skill" were played in them. The games of mere skill are, in the first place, I apprehend, exceedingly few; such a term must, I think, exclude every game in which the element of chance enters. Chess, perhaps, and draughts and some few games *ejusdem generis* would be games of mere skill, but amongst games current amongst society and not in themselves considered objectionable, the others are few in number. No game of cards, no game in which dice were used, could, I think, fall under such a category, and even billiards—so long as points are scored for unintended successes, could hardly be called games of mere skill. Were the Court to rank such games under the class "illegal" it would be obviously bringing certain places used more or less for such amusements under a class of offending houses, which no gaming laws that I am aware of have yet associated them with. In coming to the decision that the class of house entered in this case is not a "common gambling house" within the operation of this Ordinance, I am desirous of not being understood to express any opinion which should suggest insensibility to the injurious features which were pointed out, in persons meeting together for the purposes of play—one at least of the objects of the parties in this case—and were I to express my own personal opinion as to what seems to me the evils attending games of chance, when played for money or other things of value, they would probably go far beyond generally accepted views upon the subject. The extent, however, to which the Legislature can with advantage deal with such evils is obviously a question of considerable

difficulty and delicacy, and one rather for the statesman than the lawyer. The duty of the latter is to interpret only faithfully what the Legislature has declared upon the subject, and I am of opinion that it has not brought houses of this kind within the term Common Gaming Houses, as used in Ordinance 9 of 1876.

REGINA *v.* KHOO SIM CHOON.

Where a person is charged under section 46, clause 2 of the Post Office Act XIV. of 1866, with performing postal services otherwise than through the Post, it is no excuse that the Post neither do, nor can undertake the carriage of such letters to their ultimate destination and beyond a certain port.

This was an appeal from a conviction of C. W. S. Kynnersley, Esq., Assistant Magistrate, on a prosecution instituted by the Government against the appellant, under clause 2, section 46 of the Post Office Act XIV. of 1866.

The prisoner was convicted for that he on or about the 25th day of May, 1877, performed, otherwise than by the Post, services incidental to carrying letters from Penang to China.

The evidence before the Magistrate was to the effect that the appellant collected letters from the Chinese residents in this Settlement, addressed to their friends in China, and had forwarded a box containing about 900 of such letters, as freight to Amoy, and had declared the contents of the box to be "white birds' nests."

Thomas for the appellant.

D. *Logan* [*Solicitor-General*] for the Crown.

Phillips, J. This conviction must be affirmed. It is immaterial, as argued by Mr. Thomas, that we have no convention with China, and that the Post Office authorities neither do, nor can, undertake to carry these letters to their ultimate destination, beyond the port of Amoy. There is a postal route from Penang to Amoy, and so far the appellant was bound to avail himself of it, and every yard along such route that the appellant carried letters privately he was contravening the Act.

The Post Office authorities are the only agents allowed here; and if the appellant's desire was the safe transmission of the letters to beyond Amoy, he would have effected it by the appointment of a friendly agent at that treaty port, to whom they should have been addressed, and by whom they would have been forwarded to their destination.

The saving of postage, and the carrying the profits to his own account, appear to me to have been the only objects the appellant had. The conviction must be affirmed with costs.

REGINA *v.* SHEIK HOSSAIN & ORS.

PENANG.
PHILLIPS, J
1877.
July 14.

Before a person can be convicted of gambling or being the owner of a common gaming house, the prosecution must shew by evidence, what the game is that is played, so that the Court can decide whether the game falls within the Act or not.

A charge under one section of an Act followed by a conviction under a different section of another Act, is bad.

The appellants were convicted by C. W. S. Kynnersley, Esq., Magistrate,—the first appellant for "being owner or occupier of a house, and unlawfully keeping the said house open for gambling," and the other appellants for being found in a "common gambling house."

Van Someren for appellants raised the objection that the evidence did not shew what kind of game was being carried on, and that the conviction was only for opening a house for purposes of gambling—but did not state that it was a common gaming house. As to the other appellants that they were charged under one Ordinance and convicted under another.

Phillips, J. The judgment against the owner of the house must be reversed. There is no evidence of any gambling at all having been carried on in the house. Witnesses in these cases cannot constitute themselves judges of what is gambling and what is not. They should state particulars of the game that took place, so as to enable the Court to judge whether such game was gambling within the Ordinance or not.

The same objection applies to the other appellants; and in addition there is the objection that they were charged under section 39, clause 4 of Ordinance 13 of 1872, and convicted under section 2 of Ordinance 9 of 1876.

Conviction quashed with costs.

CHOOASHARY & ANOR. *v.* CASSIM.

PENANG.
PHILLIPS, J.
1877.
July 14.

A mere irregularity in the trial of a case before a Magistrate, such as calling witnesses for the prosecution after the prisoner has been called on for and stated his defence, is not such as will induce the Court to quash the conviction.

The appellants were convicted of theft by C. W. S. Kynnersley, Esq., Magistrate. The procedure, in the Magistrate's Court was somewhat irregular, such irregularity being that pointed out by the appellant's Counsel.

Van Someren for appellants, objected firstly; as to the first appellant there was no evidence against him, and secondly, that the conviction could not be sustained as witnesses for the prosecution were called after the prisoner had been called on for and stated his defence, and cited *Reg.* v. *Chot Loll*, 2 N. W. P. H. Ct. Rep. 271; *Reg.* v. *Fuidge*, 33 L. J. M. C. 74, and Act II. of 1855, sec. 57.

The respondent did not appear.

Phillips, J. I think there has been an irregularity, but I

cannot hold a mere irregularity such as this, to be sufficient to upset a conviction. The cases quoted are trials before Jury. In a Police Court such strict procedure cannot be maintained, or a stoppage of its functions would result. But I do not think the evidence against No. 1 is sufficient, and the decision of the Magistrate must be reversed. As against No. 2, the conviction is affirmed [a].

PHILLIPS, J. 1877.

CHOOASHARY & ANOR. v. CASSIM.

[a] Irregularity in any criminal proceeding, is now no ground for reversing the judgment, unless there has been a miscarriage of justice—see Section 33, cl. 2 of Ordinance 12 of 1879.

MAN & ANOR. v. SAMSAH.

PENANG.

PHILLIPS, J. 1877.

September 3.

Where, in an attack on a person, a bone is broken, this makes the offence "grievous hurt," under the Penal Code; and a Magistrate has no jurisdiction to dispose of the case summarily.

The evidence in the case shewed that the respondent had been attacked, and a bone of his finger broken: the Magistrate having tried the appellants summarily, and convicted them of voluntarily causing hurt, this Court quashed the conviction as having been made without jurisdiction, and directed the case to be remitted to the Magistrate to be heard as a preliminary proceeding, and committed to the Assizes.

The appellants were convicted by Captain D. T. Hatchell, Magistrate, of voluntarily causing hurt under section 324 of the Penal Code. The evidence shewed that the appellants had attacked the respondent, and beaten him, whereby a bone of one of his fingers was broken.

Anthony for appellants argued that as a bone was broken, the Magistrate had no jurisdiction to dispose of the case summarily—Ordinance 13 of 1872,—but should have committed them for trial, as the case proved it was grievous hurt, and cited *Regina* v. *Ramtohul Singh*, 5 W. R. Cr. 12.

Phillips, J. I had at first some doubts in this matter, but on the authority of the case cited, the conviction must be quashed, and the case remitted back to the Magistrate to be dealt with as one of grievous hurt.

Conviction quashed.

REGINA v. SHAIK ISHMAEL LEBBY.

PENANG.

WOOD, J. 1878.

June 21.

The Labour Ordinance 1 of 1876, which makes the bringing of an Immigrant to this Colony from India, without observance of the formalities therein prescribed, an offence, applies only to Immigrants who are natives of "British India."

The Crown not being named in the Appeal Ordinance, no costs can be awarded against it in an appeal.

The defendant was charged with bringing a native immigrant from India to this Colony, contrary to Ordinance 1 of 1876, section 2. It was not shewn that the immigrant brought was a

WOOD, J. 1878.

REG. v. SHAIK ISHMAEL LEBBY.

native of British India. The Magistrate, C. W. S. Kynnersley, Esq., had, in consequence, dismissed the charge.

The Crown now appealed.

D. *Logan*, [*Solicitor-General*], contended that Ordinance 1 of 1876, section 2, must have reference to a native of India generally, and not of British India only. It is sufficient if the person brought is a native of India and an immigrant, within the meaning of section 1, and cited *Maxwell on Statutes*, p. 35, 39.

Anthony for respondent, was heard contrà, and applied for his client's costs of the appeal, and referred to section 39 of the Crown suits Ordinance 15 of 1876.

Wood, J. In this matter, I consider that the point is clear, that the Act only applies to bringing of natives of British India into the Colony for labour, and that the preamble clearly shews the reason of the enactment, which otherwise would be vague and overstrained. On the question of costs, however, I am of opinion that as the Crown is not named in the Appeals Ordinance, no costs could be given against it.

Acquittal affirmed without costs.

ONG AH HUAT *v.* OPIUM FARMER.

PENANG.

WOOD, J. 1878.

August 14.

Being in possession of illicit chandoo, under the Excise Ordinance 4 of 1870, is a possession with a guilty knowledge.

Where it was shewn that the appellant was a brothel-keeper and lived in the brothel—that some illicit chandoo was found in a room of the house, which was occupied by one of the prostitutes, and when it was found, both he and the woman denied they smoked opium, which statement was proved to be false,

Held, there was no evidence of guilty knowledge.

Query. Was the chandoo at all in the man's "possession," within the meaning of the Ordinance.

The appellant had been convicted by F. H. Gottlieb, Esq., Magistrate, for being in possession of illicit chandoo. The evidence against him was, that he was a brothel-keeper, and the chandoo was found in a room occupied by one of the prostitutes kept by him, that he lived in the same house, and presumably had control over the woman's apartments, that he and the woman denied they were chandoo-smokers, which was clearly proved to be false.

Thomas for appellant. There is no reasonable evidence that the chandoo was in the possession of the appellant: *1st*, in his possession at all, *2ndly* in his possession with a guilty knowledge. No such guilty knowledge is alleged in the conviction.

[*Wood*, J. The conviction is clearly erroneous in not stating the scienter.]

On the suggestion of the respondent's Counsel, the case was argued as if the scienter were inserted, and the conviction good in form.

Ross for respondent, argued that there was evidence of guilty knowledge on the part of the appellant, for he was a brothel-

keeper and the woman presumably under his control—the chandoo was found in the room she occupied. It was part of his brothel house, and as he was himself living in the house, he must be presumed to be cognizant of what was brought into it. The statements of the prisoner, and of the woman also, that they did not smoke chandoo—when it was found that they did,—was also evidence of guilty knowledge.

Wood, J. I must hold that it is impossible on the facts as stated in this case, to infer any guilty knowledge, and therefore quash the conviction.

Conviction quashed.

CASSIM *v.* HAJI MAHOMED SYED.

Before a person can be convicted of criminal trespass, it must be shewn affirmatively, that he entered into the place in order "to intimidate, insult or annoy, or to commit an offence," within section 441 of the Penal Code.

Query. Has the Magistrate power under section 60 of Ordinance 12 of 1872, to bind a person over to keep the peace on conviction of criminal trespass? [*a*]

The appellant Cassim, had been convicted by C. W. S. Kynnersley, Esq., Magistrate, for criminal trespass. He was a Revenue Officer, and it was supposed he had entered the prosecutor's compound with a view of placing gandia [bhang] there. He was, besides being sentenced to imprisonment, bound over to keep the peace.

Van Someren for appellant. The appeal is on the ground that there is no evidence of an "intent" which can justify a conviction under section 441 of the Penal Code. The intent must be "to intimidate, insult or annoy, or commit an offence"—there is no offence here shewn—no intent is averred in the conviction. The Magistrate had no power to order the appellant to keep the peace, as the case does not fall within section 60 of Ordinance 12 of 1872.

Wood, J. I am of opinion that the conviction is bad in not defining the intent with which the criminal trespass was said to have been committed—and that to be good, it must allege that the intent was "to intimidate, insult or annoy, or to commit some offence."

No evidence is given, which can justify this finding—but the Magistrate seems to have dealt with the case as one of simple, and not criminal trespass, and to have awarded the punishment of criminal trespass to such simple trespass.

As I am of opinion that no amendment, such as should be made to make the conviction good, could be sustained by the evidence, I quash the conviction.

Conviction quashed.

[*a*]. See *Regina* v. *Thapoo*, 20 W. R. C. R., 37.

ABDUL GUNNY *v.* NEWLAND.

PENANG.
WOOD, J.
1878.
Sept. 27.

Where a person applies to a Magistrate for a summons, and the information discloses an offence, the Magistrate has no option in granting or refusing the summons; but is bound to issue it.

This was a *Rule Nisi* calling upon the Magistrate of Police, to shew cause why a *mandamus* should not issue to compel him to grant a summons against the above-named C. C. Newland, an Inspector of Police, for an alleged assault committed upon the above-named Abdul Gunny, a Kling trader.

Mr. *Kynnersley*, the Magistrate, in shewing cause stated, that he was not satisfied that the complainant has been "put in fear," and therefore refused the summons—and that he conceived that the Police were entitled to some protection from the Magistrate.

Thomas in support of the rule contended that the Police were entitled to no special protection, as sufficient and unusual protection was already extended to them by legislation-Ordinance 1 of 1872, *s.s.*42—49, and that Magistrates from the nature of their position, were expected to exert special restrictions upon infirmities of temper; and lastly, that putting a person "in fear" could not enter into the definition of an assault. *Penal Code, s.s.* 352 *et seq.*

Wood, J. said that when an offence was disclosed a Magistrate had no option but to grant a summons—that here it was stated the Inspector had used his baton, and if at home a police officer threatened a person with a baton, except in self-defence, it would probably lead to his dismissal—that Magistrates here were in a delicate position between the Executive and the native population, and the refusal of a summons on their part would lay the bench open to grave imputation of want of independence. The information disclosing an offence, the Magistrate could have no option in the matter, and the rule must be made absolute.

Rule absolute for a mandamus.

LETCHMEE AND ANOR. *v.* RAMASAWMY.

PENANG.
WOOD, J.
1878.
October 24.

On the hearing of a criminal charge against a prisoner, the Magistrate's notes of evidence of a previous case tried before him, although relating to the same subject-matter and against the same prisoner, is not admissible in evidence.

The appellants were convicted of criminal breach of trust by two Magistrates, Messrs. Hervey and Kynnersley. The Magistrates received in evidence the notes in a previous case [tried before Mr. Kynnersley] referring to the same subject-matter, and against the same prisoners.

Van Someren for appellants. The evidence of the witness James Miles, clerk to the Magistrates' Court, and the notes of evidence produced in evidence were improperly admitted.

Thomas for respondent.

Wood, J. I am of opinion that this evidence was wrongfully

admitted, and as it is not given *in extenso*, its nature cannot be known. The case is remitted back to the Magistrate with instructionst hat the evidence was improperly admitted, and the notes of evidence at a previous trial, produced by him, was not evidence. The Magistrate is further directed to commence a fresh charge.

WOOD, J. 1878.

LETCHMEE & ANOR. v. RAMASAWMY.

Order accordingly.

REGINA *v.* BEH HOOIE AND ANOR.

Before a conviction can be had under section 32 of Ordinance 13 of 1872, for being "found wandering about without being able to give any satisfactory account of oneself," the prosecution must shew that all, and not one or more only of the conditions mentioned in the section, existed.

PENANG.

WOOD, J. 1878.

October 24.

The prisoners were convicted by C. W. S. Kynnersley, Esq., Magistrate, for being "found wandering about and not being able to give any satisfactory account of themselves," under section 32 of Ordinance 13 of 1872. The evidence simply shewed that the appellants and another had been seen for several consecutive days, sometimes in the day, and sometimes at night, walking up and down the road in front of the Superintendent of Police's quarters, and apparently watching what was going on within; that they had been threatened they would be arrested if they continued doing so; that on the day of the appellants' arrest, they and their companion, were walking in front of and watching the quarters as usual, when the appellants were arrested, but their companion managed to make his escape. There was also some evidence pointing to No. 1 as being a person in the employ of Gaming House-Keepers, and it was supposed that the prisoners were watching the movements of the Police, so as to inform their masters of any apprehended visit to such houses by the Police.

Thomas for appellants.

Wood, J. I consider that under section 32, sub-section II., of the Ordinance 13 of 1872, "wanderers," as there described, must combine all the accumulative conditions of being, 1. wandering abroad, 2. lodging in any shed, &c., 3. not having any visible means of subsistence, and 4. not giving a good account of themselves; and that the evidence to support a conviction under this section, must prove all, and not one or more only, of these conditions.

I doubt whether any of these matters have been proved, and think the proceedings open to very grave question. I therefore quash the conviction.

Conviction quashed.

ONG CHEH YEW *v.* LEONG WEE QUAN.

PENANG.
WOOD, J.
1878.
October 24.

A prisoner was charged with breach of trust of certain monies entrusted to him by the prosecutor, to remit to China : the prisoner had received the money but omitted to remit it, and gave no account thereof, beyond his own statement it had been remitted. To shew the money had not been received, the Magistrate received in evidence a letter written by the remittee to the prosecutor, stating the non-receipt of the money. The prisoner was convicted.

Held, the letter was inadmissible in evidence.

Several persons, besides the prosecutor, who had been cheated by the prisoner in the same way, were called on the hearing of the above-named charge, and proved the several frauds practised by prisoner on them.

Held, their evidence was not admissible, as proving each, a distinct offence.

The appellant Ong Cheh Yew was convicted by C. W. S. Kynnersley, Esq., Magistrate, of cheating and criminal breach of trust. The appellant had received certain monies from the respondent to remit to China ; he omitted to do this and gave no account thereof. To prove the non-receipt of the money in China by the person to whom the respondent was sending it, a letter from that individual to the respondent to that effect, was received in evidence. Other persons similarly dealt with by the appellant were also called and proved that he had thus dealt with them.

Thomas for appellant.

Wood, J. I am of opinion that the letter produced by prosecutor from China, as to the non-arrival of the money there, was improperly received, and that the evidence of the other persons defrauded [not the prosecutor] was open to objection—that it was evidence of another and a different charge of criminal breach of trust. I therefore decide that the case should be sent back to the Magistrate with a direction to commence a fresh charge and rehear the case. The Court specifically instructs the Magistrate not to admit in evidence the letter produced by the prosecutor, and not to admit in the rehearing of this case, the evidence of persons as to any other charge which may be the subject of a distinct enquiry.

Order accordingly.

REGINA *v.* TAN A YEAP & ORS.

PENANG.
WOOD, J.
1878.
November 8.

Where a person is charged with breach of the Post Office Act XIV. of 1866, in performing postal services other than through the Post Office,—it is for him to shew that he comes within the exception in section 5, and not for the prosecutor to shew that he does not.

The defendants were convicted by C. W. S. Kynnersley, Esq., Magistrate, under section 46, clause 2 of Act XIV. of 1866, for breach of the Postal Regulations. A number of letters from persons in China to persons in Penang were found in the defendant's possession—these letters had no postage stamps on them.

Thomas for appellants contended that as postal communication with the interior of China was not shewn by the evidence, and as in fact there was no proof thereof, capable of being

WOOD, J. 1878. REG. v. TAN A YEAP & ORS.

adduced—a person, a native of China, where no postal law exists, cannot be held to be guilty of any offence, in conveying a letter from his native country, China, to this Colony of the Straits Settlements, in contravention of our postal law. The Indian Act XIV. of 1866, sections 4, 5 & 46, were relied on by him, but he further contended that the appellants might well be persons within the exception in section 5; they were not proved to be persons out of that exception,—all that appeared in the case, as shewn in evidence was, that they were persons leaving the ship with letters, addressed to persons in Penang, in their possession,—and that the Crown should have shewn that they were not within the exception.

D. *Logan* [*Solicitor-General*] for the Crown. The exception need not have been negatived by section 47 of Ordinance 6 of 1873.

Wood, J. I incline to the opinion that some evidence ought to have been adduced by the Crown to negative the presumption of innocence to be inferred from the mere possession of the letters by the defendants.

The *Solicitor-General* being unprepared on this point, the matter stood over for further consideration.

Ross, now appeared on behalf of the Crown, and contended that it was not necessary for the Crown to produce any evidence to shew the defendants did not come within the exception, but it was for the defendants to prove they did, and referred to *Paley on Convictions*, p. 123, citing *Regina* v. *Turner*, 5 M. & S. 206, *Regina* v. *Hanson* and other cases.

Thomas contrà.

Wood, J. I consider that on the authority of the cases referred to in *Paley on Convictions*, but especially *Regina* v. *Turner*, and *Regina* v. *Hanson*, the onus was on the defendants to shew they came within the exception in section 5 of the Act. This duty they have not discharged, and I must give judgment for the Crown.

Conviction affirmed.

DOREHSAWMY PILLAY *v.* ARNASHELLAM PATTEN.

PENANG. WOOD, J. 1878. NOV. 12.

Where there is a *bonâ fide* claim to property, the subject-matter of the charge, no conviction for a criminal offence in respect thereto, ought to be made. Therefore, where it appeared that the congregation of a Hindoo Temple was divided in the election of a trustee, and each party appointed the person chosen by them, and one of such parties resolved to repair the temple, and their trustee thereupon directed the repairs to be done, in the course of which a wall of the temple was pulled down,

Held no criminal offence had been committed.

Under such circumstances, the Court on appeal, quashed the conviction as regarded the fine imposed on the prisoner, but upheld the further order of the Magistrate by which he directed the prisoner to be bound down to keep the peace and also refused the appellant his costs.

The appellant Dorehsawmy Pillay, was convicted by E. E. Isemonger, Esq., Magistrate, of mischief, by breaking down a portion of the wall of the Hindoo Temple in Queen Street. He

WOOD, J. 1878.

DORSH-SAWMY PILLAY v. ARNA-SHELLAM PATTEN.

was both fined by the Magistrate and bound down to keep the peace. From the evidence, it appeared that the sole duly appointed trustee of the temple had died and since his death the Hindoo community had been divided—the one portion electing the respondent and certain others, as trustees, and the other the appellant and others. It appeared that a meeting had been held by the appellant's party, and it was resolved to repair the temple. In pursuance of this resolution, the appellant and workmen set to and broke down the wall with a view to carrying out the proposed repairs. The respondent's party were dissatisfied with this, and brought the above charge against the appellant, and for which he was convicted as stated.

Thomas for appellant.

Wood, J. I am of opinion that there was a good *bonâ fide* claim of title to act as the agent of persons having authority to repair, and so I quash the conviction so far as the fine is concerned, but uphold the order as to keeping the peace.

On a subsequent day, *Thomas* mentioned the matter and asked for costs, and that the adjudication to keep the peace might be set aside.

Wood, J. I think the appellant was rightly bound by the Magistrate to keep the peace, and will not touch this portion of his finding. I also make no order for costs.

Conviction quashed as regards fine only.

REGINA *v.* GOH CHOO.

PENANG.

WOOD, J. 1878.

November 12.

Before an order can be made under section 61 of Ordinance XIII. of 1872, there must be a full hearing of the complaint.

Where a Magistrate only caused the informations sworn in order to procure the warrant, to be read to the informants, in presence of the accused, and thereafter made an order that the accused find security under the aforesaid section. [a]

Held, this was no hearing, and the information was quashed with costs.

The appellant had been ordered by E. E. Isemonger, Esq., Magistrate of Province Wellesley, to find security to keep the peace. He had applied to the Magistrate to state a case for the opinion of this Court, which was refused by the Magistrate who considered the application frivolous. From the affidavits filed by the appellant, and his Counsel, as also from the copy of the proceedings and certificate furnished by the Magistrate, it appeared that on the appellant being brought up before the Magistrate, the sworn informations of the two respondents were read over to them

[a.] The following is the section: "61. Whenever any Justice of the Peace receives information that any person is likely to commit a breach of the peace, or to do any act that may probably occasion a breach of the peace, such Justice of the Peace may summon the person to attend at a time and place mentioned in the summons, before himself or before a Magistrate, or before the Court of Quarter Sessions, to shew cause why he should not be required to enter into a bond to keep the peace, with or without sureties."

WOOD, J. 1878.

REG. v. GOH CHOO.

in the presence of the appellant, and they were asked if the same were correct, and on their stating they were, the order aforesaid was made. The affidavit also stated that the appellant had applied for a postponement to call witnesses as he had been arrested only the evening before, which application was refused by the Magistrate. The Magistrate, nor the respondents, answered this portion of the affidavit, but the certificate furnished by the Magistrate stated that the appellant "produced no witnesses."

Thomas, for the appellant, having obtained a *Rule Nisi* calling on the Magistrate to shew cause why he should not state a case,

Mr. *Isemonger*, the Magistrate, shewed cause.

Wood, J. As the affidavits are not disputed, the rule must be made absolute.

The Magistrate having stated the case as directed, the appeal now came on to be heard.

Thomas, for appellant.

Wood, J. The case having now been stated, it appears that the only evidence adduced at the hearing was the informations of Tee Peat and Inspector Harvey. There does not appear to be any evidence given in the witness box, no cross-examination appears to have been allowed, nor opportunity given to call witnesses for the defence. I must hold that this was no hearing and adjudication under Ordinance XIII. of 1872, section 61, clause 3, which states that there must be an adjudication, upon evidence. I quash the order. [a]

Order quashed with costs.

KHOO TEAN TEK *v.* OPIUM FARMER.

PENANG.

WOOD, J. 1879.

February 26.

A search warrant will not be issued for the production of the private books of a prosecutor, in order to be evidence for the defence.

Query. Is an appeal from a Magistrate's decision, an "enquiry" within Sec. 25 of Ord. 20 of 1870?

This was an appeal from the decision of F. H. Gottlieb, Esq., Magistrate, Penang. The appellant was convicted of being in possession of illicit chandoo.

Thomas, for the appellant read affidavits of appellant and himself, and applied for a search warrant to produce a day book of the Opium Farmer, which it was alleged, contained an item material to the appellant's case—under section 25 of the Criminal Justice Ordinance, 20 of 1870.

Ross contrà, argued that the Court had no power to issue the warrant, nor to remit the matter to the Magistrate, except under section 32 of the Appeals Ordinance 9 of 1874; that this was in effect an application for a new trial upon fresh evidence—the

[a] Clause III. "No person shall be bound to keep the peace, either with or without sureties, till after the case shall have been adjudicated upon evidence before a Justice of the Peace, a Magistrate or Court of Quarter Sessions."

WOOD, J. 1879.

KHOO TEAN TEK v. OPIUM FARMER.

matter had been decided, and the appellant might, if he had a case, take proceedings as for perjury—the affidavit was simply hearsay evidence of a man who swore to having received information from another whom he did not name. He further contended that this was not an "enquiry," and the Court of Appeal could not use the power indicated by section 25 of Ordinance, 20 of 1870; the book was a private book, and was not a thing to be searched for, within the meaning of the Ordinance; the application was made for purposes of delaying the enforcing of the penalty awarded by the Court below.

Thomas in reply contended that this was an enquiry,—for the Court of Appeal might take further evidence—the entry would be corroborative of what is stated by the appellant's witnesses.

Wood, J. I cannot order a search warrant to issue, authorizing a police officer to search for the day book referred to, under section 25, as the appellant cannot force the prosecutor to produce his private books to be evidence in his [appellant's] favour. I give no opinion on the other objections raised.

February 27. The Appeal was now dismissed on its merits.

GAN KIM SWEE *v.* NEWLAND.

PENANG.

WOOD, J. 1879.

A Magistrate's decision will not be reversed on the ground of its being against the weight of evidence, unless it be grossly so.

When a Magistrate has fined a prisoner, the Court will be reluctant to allow an appeal, when the only complaint is the smallness of the fine. [*a.*]

February 26.

Appeal against the decision of E. E. Isemonger, Esq., Magistrate, whereby he had convicted the abovenamed C. C. Newland, an Inspector of Police, for an assault on the now appellant.

Ross [for appellant] argued that the decision was against the weight of evidence.

Clarke [*Acting Solicitor-General*], contrà, asked for a larger penalty, as the amount of the fine awarded by the Magistrate, he submitted, was too small for the gravity of the offence.

Wood, J. I am of opinion that an appeal against the decision of the Magistrate on matters of fact, should not be lightly allowed—not unless the decision is grossly against the weight of evidence. Here it is impossible to say how the demeanour of the witnesses might have told against them. This Court is no better judge of fact than any other. The Magistrate seems to have dealt with the offence in favour of the prosecutor, and I am reluctant to allow an appeal against the finding of the Magistrate, whom the Legislature no doubt reasonably considers the best and most practical tribunal for the trial of small matter of assault, when all that is complained of, is the smallness of the fine. The Magistrate might well have considered a small fine sufficient in this case, to prevent the recurrence of such an offence.

Appeal dismissed.

[*a.*] See foot-note [*a*] in *Regina* v. *Lim Peng & ors.*, *antè* p. 85.

FONG AH CHAN *v* KAH SEW.

PENANG.

WOOD, J.
1879.

February 27.

Where a prisoner is charged under section 363 of the Penal Code, with kidnapping a minor under sixteen, from lawful guardianship, the prosecution ought to shew by satisfactory and conclusive evidence, that the child is under that age.

Where the only evidence was that of the minor that her mother had told her her age, and the alleged guardian stated that the mother had also told her the same, but the parents of the child, being out of the jurisdiction, were not called,

Held, that the evidence of age was too slight for consideration, and the conviction was annulled.

Where the alleged guardian stated the minor was a niece of her husband, and had been adopted by her for the then past seven years, and the minor spoke of the guardian as her aunt,

Held, [in the absence of evidence to the contrary] that there was ample evidence of lawful guardianship.

The prisoner Fong Ah Chan, along with another, was convicted by two Magistrates, E. E. Isemonger, Esq., and C. W. S. Kynnersley, Esq., sitting as a Court of Quarter Sessions, of kidnapping a minor under sixteen, from lawful guardianship. The evidence shewed that the minor had lived for some little time with the respondent. The minor spoke of the respondent as her aunt—the respondent stated the minor was her husband's niece, and had been adopted by her about seven years before. There was no other evidence of guardianship. The minor said her age was fourteen as her mother [not the respondent] had told her so. The respondent said that when she adopted the minor, her mother told her the child was seven, but she herself considered, and then made the remark, that the child was six. The minor's parents were in China—no further evidence of age was adduced. The Magistrate saw the child, but on the hearing of the appeal, the child was not produced.

Thomas for appellant contended, 1st, there was no evidence of the age of the minor, except hearsay which was no evidence; and 2nd, there was no evidence of the lawfulness of the guardianship.

The *respondent* did not appear.

Wood, J. The conviction of No. 1 appearing on its face to be for the crime of kidnapping a female under the age of sixteen from the lawful guardianship of her aunt Kah Sew, the evidence when gone into shews that the child herself speaks to her own age as under sixteen, and also the guardian speaks to her being fourteen, but I am of opinion that there is not satisfactory evidence of the child being under sixteen, though there is some evidence. I think it entirely immaterial whether or no the guardian was the child's aunt, but I am satisfied that there is evidence of the woman being the lawful guardian. Thinking however that the case comes under sub-section 2 of section 41 of the Appeals Ordinance 9 of 1874, and that in fact the prisoner No. 1 was convicted under a charge on which in the opinion of the Court he ought not to have been convicted, I annul the proceedings and direct the prisoner No. 1 to be tried again on a proper charge. I may intimate that proof of the age of the child, as being under sixteen, ought, in justice to the prisoner, to be of a more satisfactory and conclusive kind than that adduced; I should have charged a Jury that the evidence of age in this case was too slight for consideration.

Conviction quashed—case remitted to Magistrates for rehearing.

REGINA *v.* KUCK SIN LOI.

SINGAPORE.

FORD, J.
1879.

June 5.

No appeal lies under the Appeal Ordinance 9 of 1874, from the decision of a Court of two Magistrates, and such proceedings can therefore be brought into this Court only by *Certiorari*.

The origin and constitution of the Court of Quarter Sessions, of two Magistrates, and Police Courts, considered.

Baumgarten had obtained a *Rule Nisi* under sections 25 & 26 of the Appeals Ordinance 9 of 1874, calling upon Messrs. Hervey and Dennys, the two Magistrates before whom the prisoner was convicted, to shew cause why they should not state and sign a case for the opinion of this Court.

The Magistrates refused to state a case, or to furnish the applicant with a certificate of the cause of their refusal, copy of conviction and evidence, on the ground that no appeal lay from their decisions, under the provisions of the Ordinance regulating appeals from Magistrates,—or if any appeal did lie, it was under the provisions regulating Courts of Quarter Sessions in place of which Courts, two Magistrates now act. Appeals from Quarter Sessions lie only upon points of Law reserved.

Bond, shewed cause.

Baumgarten, supported the rule.

Cur. Adv. Vult.

On this day, judgment was delivered by

Ford, J. The question raised in this case has, I think, been properly brought before the Court; it being a question of some difficulty. Before dealing with the numerous Ordinances which affect the question, I will trace as nearly as I am able, the history of both Courts of Quarter Sessions and Magistrates' Courts.

Courts of General and of Quarter Sessions were apparently established and continued under the Charters of 1826 & 1855, and consisted of Justices of the Peace presided over by the Recorder or one or other of the Judges of the Court of Judicature. These Courts do not seem to have sat very often or with much regularity, and by Ordinance 5 of 1868—the year after the transfer—were abolished with the former Court of Judicature. These Courts were, however, resuscitated by the Ordinance 5 of 1873, with an Appeal upon points of Law reserved by their President to the Judge of Penang or the Chief Justice as the case might be; but, not being found to work in practice, were, by implication, again abolished by Ordinance 17 of 1876. This Ordinance, by its 3rd section, transferred [with some limitations as to powers of punishment] all their "jurisdiction, powers, and duties" to "two or more Magistrates sitting in a Police Court." Ordinance III. of 1878—the present Courts Ordinance—does not enumerate Courts of Quarter Sessions amidst the present Courts of the Colony, and they may be treated therefore as if abolished in terms.

The origin of our Magistrates' Courts, I have not been able quite to trace, but the Indian Act XIII. of 1856, which is a consolidation Act, gives powers to the Government to appoint Magis-

trates to them; and we may fairly take it that, from that time, our Police Courts fell under its provisions both in their principle of constitution and procedure. That Act seems to me generally to contemplate the Police Courts in their summary jurisdiction being presided over by one Magistrate—but, in the case of Madras and Calcutta, it provided for certain cases, in which a prosecution in the Supreme Court would be ineffectual in consequence of the absence of material witnesses, being tried by two Magistrates. This provision was not extended to Bombay or the Straits Settlements; in the case of Bombay, apparently [S. 32] from its having a Court of Petty Sessions, and perhaps in the case of these Settlements from their having a General or Quarter Session. The next Police Act—Act XLVIII. of 1860—repeals many of the sections of the Act of 1856, and, amongst them, the 32nd, and in its place [Section 4] gives the same exceptional powers to two Magistrates in the Straits Settlements that the previous Act had conferred in Madras and Calcutta. We have thus, I think, the origin of what may be termed the two Magistrates' special jurisdiction. It does not appear that this Act gave any special Court of Appeal from their decisions, but on the transfer of these Settlements to the Colonial Office, the Magistrates' Appeals Act XXVII. of 1867, was passed, and by section 23, its provisions—including a right of appeal to the Supreme Court—were made applicable to proceedings before Magistrates' *sitting with other Magistrates* or with Justices of the Peace in summary jurisdiction, whether in Courts of Petty Sessions or in ordinary Police Courts. So matters remained apparently until the year 1871, when in lieu of section 49 of Ordinance 5 of 1870 [another Criminal Procedure Ordinance which gave a single Magistrate powers of adjudication up to 6 months' imprisonment or $100 fine] powers were given by section 3 of Ordinance 13 of that year to *two or more* Magistrates to try certain cases of a graver kind, and to inflict punishments up to 12 months' imprisonment and fines of $500. The jurisdiction given by Act 48 of 1860 in cases of witnesses about to leave the Settlement, was continued by both the Criminal Procedure Acts of 1870 & 1873, but I do not find that any new Court was to be constituted for the exercise of the extended jurisdiction: any two Magistrates were enough for the exceptional jurisdiction in probable absence of witnesses, and two or more Magistrates could exercise the extended jurisdiction in other matters. Both class of cases were, it seems to me, to be heard—as indeed has always I believe been the case—by Magistrates sitting in a Police Court. The only Magistrates' Court seem to me to have been Courts of one Magistrate in Summary Jurisdiction, Courts of two or more Magistrates with an extended Summary Jurisdiction. In practice the officers of the single or Police Magistrates' Court have discharged and continue to conduct all the administrative business attaching to proceedings before either one or two or more Magistrates—and, up to that date, Appeals still, I take it, lay under Act XXVII. of 1867. In the year 1872, the idea of resuscitating Courts of Quarter Sessions seems to have occurred to our prolific producers of local legisla-

FORD, J. 1879.

REG. v. KUCK SIN LOI.

tion, and by a consolidating Summary Criminal Jurisdiction Ordinance, 13 of 1872, the old powers in cases where the absence of a material witness was probable, were conferred upon Quarter Sessions, together with a very enlarged summary jurisdiction generally; and by section 4, "Until Courts of Quarter Sessions were constituted, the jurisdiction therein conferred on such Courts was to be exercised by such two or more Magistrates as might be appointed by the Governor for that purpose at each of the Settlements, and the expression "Quarter Sessions Court" or "Court of Quarter Sessions" as "used in this or any other Ordinance," was to be held to mean "such two or more Magistrates till Courts of Quarter Sessions were constituted."

The effect of these sections seems to me—even if there had been any distinction between two Magistrates' Courts and a Court of two Magistrates—to have made them identical. I believe, as a matter of fact, that no two Magistrates ever did sit under this temporary provision, but had they done so, I find nothing to liberate them from the powers of appeal given by Ordinance 27 of 1867, which [section 23] were applicable to proceedings "before Magistrates sitting with other Magistrates in ordinary Police Courts."

By Ordinance 5 of 1873, Courts of Quarter Sessions came into force, and no two or more Magistrates had any longer the powers given them by Act XLVIII. of 1860 and subsequent Acts and Ordinances. All these powers were, by force of the Ordinance of 1872 and 5 of 1873, transferred to Courts of Quarter Sessions. By sections 75 & 76, however, of the latter Act, the Governor had apparently power to add another Magistrate to an ordinary Police Court, but such a Court must not be confounded with the Courts of two Magistrates with enlarged powers and jurisdiction which had been done away with on Quarter Sessions being re-created; nor must section 93, which directed "appeals against the decisions of the Magistrates' Courts at Singapore and Penang to be heard before the Presiding Judge at those Settlements" be read as having reference to those Courts. These were, so to speak, swallowed up in Quarter Sessions, appeals from which were specially provided for. Up to the passing of Ordinance 17 of 1876 [an Ordinance to amend No. V. of 1873], things remained in this state, with the exception that by the Appeals Ord. 9 of 1874, fresh evidence was afforded of the entire absorption of these two Magistrates' Courts, by the provisions of Sec. 23 of Act XXVII. of 1867 being omitted. Appeals from the then remaining Magistrates' Courts were to the Presiding Judge of the respective divisions of the Supreme Court, and Appeals from Quarter Sessions to the Supreme Court upon points of law reserved only. By section 3, however, of Ordinance 17 of 1876, Courts of Quarter Sessions were, by strongest implication, abolished, and, all jurisdiction, powers, and duties conferred or imposed on Courts of Quarter Sessions at the several Settlements by the Courts' Ordinance 1873, or by any other Law in force at the time this Ordinance came into operation, were conferred and imposed on, and to be exercised by two or more Magistrates *sitting in a Police Court.*'

This Ordinance also fundamentally altered the constitution of the Supreme Court itself, breaking up its former constitution of divisions, and thus it became necessary to provide for appeals from the ordinary Magistrates' Courts, as well as if it was thought desirable to substitute some method of appeal from the decisions of two Magistrates sitting in lieu of Quarter Sessions—the former procedure for which appeals was evidently unsuited to the Court of two Magistrates. Section 8 is the only one which refers to appeals, and, as it is directly stated to be in substitution of section 93 of Ordinance 5 of 1873, [which, as I have said, had no reference to Courts having such jurisdiction as is now given to two Magistrates] and is confined to "decisions of one or more Magistrates" [terms quite applicable to Courts constituted under sec. 76 of that Ordinance,] seems to me not to provide for appeals against the two Magistrates' Courts, constituted in lieu of Quarter Sessions. Ordinance 3 of 1878, sections 1 & 57, seem to keep up the distinction between 'two Magistrates' Courts' and 'Courts of one or more Magistrates,' [although what the difference is in practice I have not been able to discover,] and gives an appeal from either form of Court to a Judge of the Supreme Court, but does not state under what provisions the appeal is to be made, those formerly guiding appeals from Quarter Sessions or those guiding appeals from Magistrates.

If the appeals Act XXVII. of 1867 had been in force, I should not have had much hesitation in saying that the recent two Magistrates' Courts had simply reverted back to their original status, and appeals lay under its provisions by virtue of the 23rd section; but Act XXVII. of 1867 was repealed by the Appeals Ordinance 9 of 1874, which omitted the provisions for appeals from more than one Magistrate, and this Ordinance, framed when there were no two Magistrates' Courts in existence, cannot, I think, be made to apply to them now. The Court is then driven to consider, there being clearly a right of appeal, under what form is it to be? Can the Court revert back to the procedure given by Ordinance 9 of 1874, to cases before Courts of Quarter Sessions, and then put two Magistrates' Courts in every respect in place of Quarter Sessions? I confess I do not see how that can be, for as Ordinance 9 of 1874 gave an appeal only upon points of Law reserved by the President of that Court, who was also to be a Judge of the Supreme Court, and there is no such President in existence, I cannot see how it is possible to follow that form of procedure. I am driven, therefore, to the conclusion, that this question of how the appeal from these two Magistrates' Courts is to be brought, is a *casus omissus*, and that no provision has been made for such appeals. The Court is therefore, I am of opinion, driven back upon its powers under a *Certiorari* by which to entertain a motion of this character. I am compelled, therefore, although with regret, to discharge this rule. I do so, however, under the circumstances of the case without costs. With the doubts existing in this Colony even upon the powers of the Court under a *Certiorari*, it is to be hoped, that the Legislature will at once

FORD, J. 1879.

REG. v. KUCK SIN LOI.

provide a means of having these appeals satisfactorily brought before the Court. [a]

CONNOR v. TAN JIM SIN.

PENANG.

WOOD, J, 1879.

August 5.

No conviction can be had for receiving a gratification under section 161 of the Penal Code, unless it be received for doing what would be a strictly official act.

The appellant, an apothecary, came to this Colony under a contract with the Indian Government, that he was required to do only Hospital duties, and was not to be restricted from private practice. On his arrival here, he was placed in charge of a Hospital in Province Wellesley. Not long after, a patient was admitted into the hospital suffering from wounds received in a fight, and his friends applied to the appellant for a certificate of the wounded man's condition, in order to procure a warrant for the apprehension of the assailants. The general practice of the apothecaries in the Settlement was to grant such certificates without remuneration, and the Medical Officer considered it was the duty of the appellant to have granted the certificate without charge. There was no other evidence of its being an official act. The appellant declined to grant the certificate unless he was paid, as he considered it no part of his duty to give it, whereupon he was paid $5, and then granted the certificate. The Magistrate convicted him under section 161.

Held, the conviction could not be sustained.

The appellant, T. A. Connor, was convicted by E. E. Isemonger, Esq., Magistrate of Province Wellesley, under section 161 of the Penal Code, for receiving a gratification, to wit $5, other than legal remuneration, as a motive for doing an official act, to wit, signing a certificate of health. It appeared that he was the Apothecary in charge of Sungei Bakup Hospital, that one Law Sin Hut had been admitted into the hospital suffering from wounds received in a fight. The respondent had applied to the appellant for a certificate as to the condition of the wounded man, in order to procure a warrant for the apprehension of his assailants. The former Apothecaries at that hospital had always furnished such certificates without remuneration, and this was the practice of most of the Apothecaries in town as well as in the Province. The appellant declined to give a certificate unless he was paid $5 for it. This was paid him and the certificate granted. The Doctor, stationed at Province Wellesley, the appellant's superior officer, considered it was the duty of the appellant to grant the certificate without charge. The appellant contended he had come under a contract with the Indian Government to perform hospital duties only, and with the right of having private practice, that the granting of the certificate was no part of his hospital duty, and he was not bound to give it unless he chose, and on such terms as he wished to impose.

Van Someren, for appellant. There is no evidence that what he appellant did was an official act. The only evidence that points faintly to its being so, is the almost general practice of Apothecaries, and the opinion of the Doctor. The defendant was entitled to charge for his service, even supposing it to be an

[a] Ordinance 9 of 1874, has been repealed by Ordinance 12 of 1879, which gives an appeal as was sought for in this case. This decision, however, is reported as partly touching on the history of the lower Courts. See also, Preface &c., Civil Cases, Volume I. of these Reports.—J. W. N. K.

official act, because by his contract with the Crown, through the Indian Government, he was required to do certain things only, which do not include the act complained of. The appellant is entitled to make a reasonable charge for doing anything not his duty. He also read certain affidavits setting out the contract with the Indian Government, under which the appellant came out—the affidavits also stated that the Magistrate had refused to look at this contract. The affidavits were unanswered.

The respondent did not appear.

Wood, J. I am of opinion that there is no evidence of the defendant having done any *official act*. The evidence does not shew this, in terms, to be an official act, and there were no means of judicial knowledge in the Magistrate, that this act was an official act, either at Common law or by the provisions of any legislative enactment. The facts, as set forth in the case, by no means establish anything more than that the defendant, probably rightfully, insisted on private remuneration for duties which were not within the range of his general duties as Apothecary to a hospital. I understand such duties to be the charge and care of the sick in hospital only, and a report or certificate given to a private individual, in such a matter as the one alluded to, should have been specially dealt with in the contract between the Crown and the Apothecary. This not having been done, the Apothecary was free to exercise his own free will in granting or withholding any such certificate. It is not to be presumed that he had any obligation to grant such a certificate, and his granting it might be subject to any condition he chose to impose. Nor was the certificate, so far as I can see, essential to any proceedings, though of possible service to the person asking for the certificate. It would certainly be most advisable that the Apothecary should be bound not to charge for things done as Apothecary, though extra his duty; or if allowed to charge, that the money should go to the Crown, and be reasonable in amount.

However unreasonable and improper it may appear to be, that the Apothecary should have a right of withholding such a certificate, as forms the subject of this complaint, except on payment of a fee named by himself, yet the conviction can only be supported, in the case of a fee taken for doing a strictly official act, which I am of opinion this was not.

Referring to the language of clause 8 of section 48 of Ordinance 9 of 1874 "that if the facts of the case are such that no valid charge can be preferred against the person accused in respect of the facts proved, the conviction shall be quashed," I order the appellant—the accused person—to be discharged, and the conviction quashed and fine returned.

Conviction quashed.

SECUNDER *v.* KYAMBOO.

REGINA *v.* SHAVOO.

PENANG.

WOOD, J.
1879.

October 15.

Where the evidence in a case leaves it doubtful which of two or more offences [some within and some beyond the Magistrate's jurisdiction] a prisoner has committed, and the Magistrate has convicted for one within his jurisdiction, this Court will not interfere with his decision: but where the evidence shews that the prisoner has committed only one and that a graver offence, and the Magistrate has wrongly convicted him of a lesser offence and one over which he has jurisdiction, the Court annulled the conviction, and remitted the case to be dealt with as on the graver charge.

Where therefore a Constable in order to obtain money, falsely charged a milk man with having adulterated milk in his possession, and threatened to take him before the Magistrate on such charge, and thereby obtained money from the man in consideration of his releasing him,—and the Magistrate convicted the Constable of receiving a gratification for forbearing to do an official act,

Held, that the conviction could not be sustained, as the Constable forbore to do not an official act, but a wrongful act, and the Magistrate had no jurisdiction.

The first appellant, Secunder, was convicted by F. H. Gottlieb, Esq., Magistrate, under section 162 of the Penal Code for obtaining from the respondent Kyamboo, a gratification for the 2nd appellant Shavoo [a Police Officer], for forbearing to do an official act. The 2nd appellant was convicted under section 164 for abetting the 1st appellant in obtaining such gratification for himself.

The appellants were tried together. The evidence against them shewed that the respondent Kyamboo was a milk-seller, and on the morning in question was walking down Pitt Street with his pail of milk, when he was stopped by the appellant Shavoo who wanted to take him off to the Police Station on a charge of having adulterated milk in his possession. The respondent Kyamboo resisted this, when the appellant Secunder interposed, and said, if a dollar was given the Constable, he would let him go. Kyamboo then left his pail with the Constable and Secunder, and went and fetched a dollar which he handed to Secunder, who handed same to the Constable, who thereupon released Kyamboo and his pail of milk. News of this reached the Station and the Corporal in charge took both Secunder and the Constable into custody. It appeared the milk had not been adulterated, and the act of the Constable was done merely for the purpose of obtaining money by fear and threat of a criminal charge.

Van Someren, for appellant Secunder.

C. W. *Rodyk*, for appellant Shavoo.

The respondents did not appear.

Van Someren contended that the offence disclosed by the evidence was theft or extortion and no other. The evidence points to one offence and one only, and it can hardly be presumed that the Magistrate could have convicted the men, except by dealing with the case as a whole.

[*Wood*, J. I think that the Magistrate had it in his discretion to consider the graver charge of extortion as not made out, and had so decided in his adjudication. I cannot take upon myself to correct this view.]

Van Someren, referred to *Mayne on the Penal Code*, 316, and

Regina v. *Walton*, 32 L. J. M. C. 79. He further contended that the evidence did not shew the milk was adulterated, but the contrary. It clearly shewed that the Police Constable Shavoo did not therefore forbear to do an official, but forbore to do a wrongful act; and so Shavoo and Secunder could not have been guilty under these sections 162 & 164, but, if guilty of anything, must have been guilty of extortion by attempting to obtain money by fear and threat of a false charge of being in possession of adulterated milk, and if guilty of extortion, the Magistrate had no jurisdiction to convict.

Wood, J. With great reluctance, I am bound to hold this objection tenable, and that the conviction must be quashed inasmuch as the Magistrate had no jurisdiction to deal with the graver offence. I cannot find that there was any evidence which could justify the conviction for the minor offence. The convictions in both appeals are annulled, but the case is remitted for the prisoners to be retried on the graver charge of extortion with a view to the case being dealt with before either a bench of Magistrates, or the prisoners being committed for trial at the Assizes.

Conviction quashed and case remitted.

VERAMAH *v.* THAIVOO.

A conviction for theft or cheating must shew that the property stolen or cheated, is the property of some person, so as to be certain and not vague. The objection is not one of form.

Semble. The Ordinance 5 of 1870, does not apply to proceedings or convictions by Magistrates.

The appellant Veramah was convicted by N. P. Trevenen Esq., Magistrate, for cheating. The conviction omitted to state whose property it was that the person was said to have obtained by the cheating.

Van Someren, for appellant. The objection is, that the conviction does not shew that the money obtained was the property of Thaivoo, or whose property it was. *Regina* v. *Martin*, 8 A. & E. 481; *Rex* v. *Sill*, 17 Jur. [O. S.] 22, s.c. 21 L. J. M. C. 214; Dears C. C. 10. This last case shews the objection is not one of form, but substance. A similar objection was taken in *Regina* v. *Willans*, 1 Mad. H. C. 31, but overruled under the Act XVIII. of 1862. This Act does not, of itself, apply to this Colony, but the Act is applied by Ordinance 5 of 1870, but by that Ordinance is made applicable only to the Supreme Court,—see sec. 47. *Mootoo Bawa*, appellant, v. *Nahoo*, respondent; and *Govinden* v. *Vengadashellum*, decided by Sir William Hackett in this Court, on 23rd October 1873. [*a*]

Wood, J. The conviction is liable to the objection urged, there

[*a*] *not reported.*

WOOD, J. 1879.

VERAMAH v. THAIVOO.

being no Ordinance of our own Legislature, or the Indian Acts applicable to the Colony, applicable to remove this technical, but no less good objection. It is much to be regretted that modern English Acts are not followed in this particular.

Conviction quashed.

NAWAS & ANOR. *v.* SHAIK RAJAH ALLI.

PENANG.

WOOD, J. 1879.

October 15.

The holding of a kunduri or feast in one's private residence, does not require a pass from the Police authorities, and the holding of such kunduri, apparently without a pass, is not illegal, so as to render persons assembled with the object of disturbing such kunduri and preventing people from attending same, not punishable under section 143 of the Penal Code.

The appellants had been convicted by N. P. Trevenen, Esq., Magistrate, under section 143 of the Penal Code, of being members of an unlawful assembly, the object of which was to cause a disturbance by criminal force, in order to compel the respondent to omit holding a kunduri [or feast] at his private residence.

The evidence shewed that the respondent had a kunduri at his house, and the appellants, who were members of a Kongsi or secret society, having reason to suppose this kunduri was given with the object of enticing away their members, assembled with several others in front of respondent's house and threatened to assault anybody attempting to go into the house. They also had a rowdy meeting at their residence, not far from respondent's, under the plea of themselves having a kunduri, which was a sham, and done in order to draw away the people from respondent's feast.

H. C. *Vaughan* for appellants. The conviction is bad as being under section 143, and it ought to have shewed that the respondent was legally entitled to hold a kunduri—the conviction should have gone on further to state that by a pass from the Superintendent of Police, respondent was legally entitled to hold such kunduri. This is a substantial objection, because at the trial, positive evidence was required to shew that he had a right to hold it. A Kunduri means a feast, not necessarily public, but a feast private or public.

[*Wood*, J. I am of opinion that the conviction is not informal in stating that the respondent was legally entitled to hold a kunduri, in other terms, a "feast" or "supper."]

2ndly. By Ordinance 13 of 1872, section 19, whoever infringes any rules &c., is liable to a penalty. There is a Police Regulation which directs something about kunduris or assemblies of some kind. The respondent not having complied therewith, his assembly was illegal.

[*Wood*, J. On the evidence, there is nothing to shew that prosecutor in the Magistrate's Court [respondent], was holding a kunduri which was illegal, but the matter may stand over to to-morrow, to allow the appellants to produce any Police regu-

lation which prove that the holding of such a kunduri is contrary to such regulation.]

Vaughan then asked for a mitigation of sentence.

Wood, J. I decline to interfere with the discretion of the Magistrate in awarding punishment.

No regulation on the point was produced and the

Conviction affirmed.

REGINA *v.* OOI TIM & ORS.

The mention in a notice of appeal of the Ordinance under which it is given, is not essential, and any inaccurracy in that respect is immaterial. Where therefore a notice of appeal purported to be given under the Appeals Ordinance 9 of 1874, a few days after its repeal by the new Appeals Ordinance 12 of 1879,

Held, the inaccurracy did not render the notice void or prevent the appeal being heard.

Appellants were convicted for obstructing with their floating nets, the fair way of the South Channel, under section 25 of the Harbour Ordinance 8 of 1872, and in a second count with floating their nets in more than 2½ fathoms water, under section 37 of the Ordinance.

Held, these were two distinct offences, and as only one penalty was awarded, the conviction was bad.

Sections 25, 32, 33, & 34 of the Appeals Ordinance 12 of 1879, do not enable the Court to amend such an error in a conviction.

The appellants were convicted by T. A. Fox, Esq., Marine Magistrate, on the 7th September, 1879, for breach of the Harbour Ordinance 8 of 1872. The conviction was on two counts, the 1st for causing an obstruction in the fair way of the South Channel by means of their floating nets in breach of section 25 of the Ordinance, and the 2nd count for placing their said nets in more than 2½ fathoms at low water spring tide in breach of section 37 of the Ordinance. Neither count stated the date of the commission of the offence. Notice of appeal was given on the 10th September, requiring the Magistrate to state a case under Ordinance 9 of 1874.

H. C. *Vaughan* for appellants. The conviction is bad for not setting out the time of committing the offence. By Ordinance 13 of 1872, section 66, a form is given, but the form is not followed. The section says the Magistrate "may" use the form, yet still it is imperative on him to do so, and the apparently permissive words are not permissive. *Newman* v. *Hardwicke*, 8 A. & E. 124. Any how the conviction must at Common law state *time*. It is not so, if excepted by the legislature, but this Act, by words which are imperative, makes it essential.

2ndly. The conviction awards a single penalty for two offences, whereas it should have disposed of each offence separately, so as to afford to the defendants an opportunity of pleading the conviction to a subsequent charge, for one or the other of these offences. *Paley on Convictions*, 265; *Newman* v. *Bendyshe*, 10 A. & E. 11; *Opium Farmer* v. *Koh Boo An*, Straits L. R. 278.

Ross for respondent. Whatever may be the objections to the

WOOD, J. 1879.

REG. v. OOI TIM & ORS.

conviction, the appellants have not complied with the Appeal Statute. Ordinance 12 of 1879 came into operation on the day of its date—4th September 1879. This Ordinance repeals Ordinance 9 of 1874, and so, on 5th September that Act [9 of 1874] had no existence—section 48 of the Ordinance of 1879. Section 18 of the New Ordinance alone gives the defendants a right to appeal, and instead of appealing under the new Ordinance, they appeal under the old one. This reference in the notice binds the defendants—it is not surplusage.

[*Wood*, J. The reference to the Ordinance was not material, or an essential part of the notice, and so inaccuracy is immaterial.]

As to the 2nd objection. There are not two offences of which the defendants are convicted but one offence. Section 25 of the Harbour Ordinance enacts that the navigation shall not be obstructed. Section 37 enacts that the Governor in Council may make rules.

[*Wood*, J. I observe that the bye-law or rule of the Governor in Council is not set out, and that the real offence in the 2nd count of the conviction, is not properly averred.]

The offence 2ndly charged, if not an offence, is merely surplusage, and therefore the conviction is only for one offence. The Court can order a conviction to be amended by reference to the proceedings, and in fact draw the conviction if there are sufficient materials. Section 6 of Act 20 & 21 Vict., c. 43. The Court will amend the not setting out of the bye-law under sections 32, 33 & 34 of the Appeals Ordinance 12 of 1879, for here proceedings must mean the *conviction*. Section 25 also gives the power to deal with the conviction.

Vaughan in reply abandoned the first point as it could be amended.

Wood, J. I am of opinion that the conviction cannot be sustained, inasmuch as it purports that the defendants were convicted in one penalty for two offences which might have been separately dealt with. I give this decision with great reluctance, but I hold that the general right of a defendant to insist on a conviction which is within itself sufficient on all material points, still exists. I am also of opinion that the powers given to the Court in sections 25, 32, 33 & 34 of the Appeals Ordinance 12 of 1879, do not enable the Court to amend a conviction, or order it to be amended in such a manner as this.

Conviction quashed.

NARAINASAWMY *v.* MARIAPEN.

PENANG.

WOOD, J. 1879.

October 31.

If there is a reasonable or arguable ground of objection to a conviction, an application to state a case under the Appeals Ordinance, Section 18, is not "frivolous." A Magistrate refusing, under such circumstances, to state a case, will be ordered to do so.

Van Someren had obtained a Rule calling upon F. A. Swetten-

ham, Esq., Magistrate of Province Wellesley, to shew cause why he should not state a case in accordance with the provisions of the Appeals Ordinance.

Mr. *Swettenham* shewed cause, and contended that the application was a frivolous one. He offered now to return an amended conviction, and cited *Maxwell on Magistrates*, p. 33 ; that the application was frivolous because there was a clear cheating within the meaning of section 415, the prosecutor having parted with $35—no matter to whom—there was moreover no substantial objection to the Magistrate's decision—*Oke's Magisterial Synopsis*, 218, note 18, p. 223, note 23, citing *Reg.* v. *Mentham*—he asked to put in the amended conviction.

Van Someren submitted that the Magistrate was not entitled to put in the conviction now. *Maxwell*, p. 33 ; the conviction had been returned into Court, the copy of the evidence, with certificate of refusal, and copy of formal record of the conviction was now on the files of this Court, clause 3, sec. 18 of Appeals Ordinance 12 of 1879 ; that the copy of a conviction was the same as a conviction, *Reg.* v. *Eaton*, 2 T. R. 472, the facts of this case did not admit of the conviction being altered. He also objected that the certificate did not shew that the conviction was under Sec. 415, but it may be inferred that it was a finding of guilty on a charge of cheating, although irregular in form—the case shewed that the conviction must have been already drawn, and a copy of such final conviction handed over—this shewed the extreme limit of the *tempus penitentiæ*—he further submitted that even supposing the new conviction to be true, and an amended one, and rightly put in, it was still bad on the ground that the property, $35, was not stated to be the property of the party defrauded.

Mr. *Swettenham* in reply, stated that the applicant, did not give the grounds of complaint in his application to the Magistrate, though he had done so in the affidavit.

Van Someren on this, contended that it was not necessary to state the grounds, as section 18 said nothing of the grounds of application. Sec. 19 first mentions the statement of grounds in the affidavit, and cited *Taylor on Appeals*, p. 40.

Wood, J. I am of opinion that there is reasonable ground of objection on the whole case, and am inclined to think that a tangible and arguable point is raised as regards the form of conviction at least.

Rule absolute without costs. [a]

[a] When an objection cannot be held to be frivolous.—See *Dalton* v. *McIntyre*, 1 Dowl. [N. S.] 76.

In re VANJOOR MUSTAN.

SINGAPORE.
—
SIDGREAVES, C. J.
1880.
—
March 1.

A Commissioner of the Court of Requests, although he is and can only be a Magistrate, has not, when he sits as Commissioner, the powers of a Magistrate, and cannot therefore fine, or commit to prison for an assault on his peon, or the like, except as provided by the Court of Requests Act, 1866. [*a*]

Donaldson on behalf of Vanjoor Mustan had obtained a *Rule Nisi* calling upon A. W. V. Cousins, Esq., Commissioner of the Court of Requests, to shew cause why a writ of *Certiorari* should not issue to remove into this Court, the record of the proceedings in the Court of Requests in the matter of a fine imposed upon, and the commitment of Vanjoor Mustan on the 12th day of February, 1880, for an alleged assault upon one Shaik Mohamed, a peon of the said Court, in order that the same might be quashed.

From the affidavit of Vanjoor Mustan in support of the rule, it appeared that one of the peons of the Court of Requests having complained that he had been assaulted by the servant of one Savena Gulam Mezdin, he Vanjoor Mustan had been sent for to the Court, and then and there, upon the unsupported statement of the peon, that he had been struck by the said Vanjoor Mustan,—but who did not state when, or under what circumstances he had been struck,—he [Vanjoor Mustan] was sentenced to a fine of $25 or 6 weeks' imprisonment in default.

T. *Braddell* [*Attorney-General*] shewed cause.

Donaldson supported the Rule.

Cur. Adv. Vult.

Sidgreaves, C. J. It will be seen from the affidavit filed by Mr. Cousins, and it was admitted by the Attorney-General in his argument in opposing the making of the rule absolute, that the contention is that this conviction can be supported and apparently only supported on the ground that Mr. Cousins whilst sitting as Commissioner of the Court of Requests was acting in his Summary Jurisdiction as a Magistrate. If he were so acting then these proceedings by Certiorari would be irregular inasmuch as by the Appeals Ordinance 1879, no proceedings before a Magistrate so acting, shall be removed into the Supreme Court for revision by Certiorari.

The 21st Section of Ordinance 29 of 1866 shews what the Commissioner might have done for the protection of any Officer or Bailiff of the Court while in the execution of his duty. That section is as follows:—

"If any Officer or Bailiff of any such Court shall be assaulted while in the execution of his duty or if any rescue shall be made or attempted to be made of any person arrested or goods levied under process of any such Court, the person so offending shall be liable to a fine of fifty dollars, to be recovered by order of such Court, or before a Magistrate, and the Bailiff of the Court, or any Peace Officer in any such case may take the offender into custody [with or without warrant] and bring him before such Court or Magistrate accordingly."

[*a*]. See *Davidson* v. *Ord*, Civil Cases, Vol. I. of these Reports, p. 205.

The Attorney-General however admitted that the Commissioner could not be said to have acted under that section inasmuch as the punishment set out in the conviction, exceeded the powers given by that section and indeed the conclusion of the previous section 20, giving power in cases of contempt of Court to impose a fine not exceeding $25, and in default of payment, to commit the offender for any time not exceeding 7 days, clearly shews that such imprisonment in default could not have been contemplated by the 21st section.

The process that ought to have been adopted on non-payment of a fine imposed under section 20 being clearly set out in sections 14 & 15 of the Act.

Section 14 is as follows:

"Payment of any fine imposed by any Court of Requests under the authority of this Act, may be enforced upon the order of the Commissioners of such Court in like manner as payment of any debt adjudged in the said Court, and shall be accounted for as herein provided."

Section 15 prescribes the mode in which such payment of any debt shall be recoverable.

The Attorney-General therefore rested his case on behalf of the Commissioner entirely on the ground of his having acted in the matter as a Magistrate, exercising his Summary Jurisdiction. This view of the matter being urged upon the Court, this dual position and these double powers being claimed on behalf of the Commissioner of the Court of Requests, becomes the duty of this Court to enquire into, and define as clearly as may be what the powers of the Commissioner really are.

Until the passing of Ordinance 5 of 1873 no particular qualification was necessary for a Commissioner of the Court of Requests beyond that originally required by the Charter of 1826 which gave authority to the Governor or President of the Council of the Settlement to erect and establish such Court or Courts of Judicature as they should see fit for the recovery of small debts and for the trial and determination of all suits and causes whatsoever against any of the inhabitants of the said Settlement of Prince of Wales' Island, Singapore, or Malacca, wherein the debt duty or matter in dispute should not exceed the value of $32 [subsequently increased to $50] and from time to time to appoint any of the inhabitants whether Britishborn or not to be the Judges of the said Court or Courts respectively.

Act XXIX. of 1866 whilst defining the powers and duties of the Commissioners made no alteration in their qualification if such it can be called. A series of Ordinances however, beginning with Ordinance 5 of 1873, enacted that the Court of Requests should be presided over by a Magistrate as Commissioner of the Court, and by the Law as it at present stands under Ordinance 3 of 1878, section 53, all suits in which the sum claimed or the value of property claimed shall not exceed $50 shall be heard before a Court of Requests to be presided over by a Magistrate as Commissioner of the Court.

Here we have then the qualifications of those who can be appointed to act as Commissioners of the Court of Requests out

SIDGREAVES, C. J. 1880.

In re VANJOOR MUSTAN.

down to a particular class, no longer are all the inhabitants of the Colony whether British born or otherwise, eligible for appointment as such Commissioner, but the choice is limited to a class, *viz.*, Magistrates; to say that this is equivalent to arming the Commissioner of the Court of Requests whilst acting in that capacity with the additional powers of a Magistrate of Police acting in his summary jurisdiction, is to say in effect that Act XXIX. of 1866, has been repealed by the use of those simple words in the Court's Ordinance to be presided over by a Magistrate as Commissioner of the Court. If the Commissioner of the Court of Requests has by virtue of those words larger powers than those given by that Act, then that Act ceased to have any practical operation. It appears to me that the question can be reduced almost to an absurdity by allowing for a moment that Mr. Cousins occupies the dual position at one and the same time of Commissioner of the Court of Requests and Magistrate of Police. In proceedings of this nature he would claim as he does now that he acted as Magistrate of Police in his Summary Jurisdiction, and that by the 31st Section of the Appeals Ordinance proceedings before a Magistrate acting in his Summary Jurisdiction shall not be removed into the Supreme Court or Court of Appeal for revision, by *Certiorari*. If proceedings were taken by way of appeal to the Supreme Court, to reverse his decision as that of a Magistrate of Police, he could at once put a stop to such proceedings by Section 10 of the Appeals Ordinance which enacts that there shall be no appeal from the decision of a Court of Requests.

The last enactment seems to shew clearly that it could not have been the intention of the Legislature to place the Commissioner of the Court of Requests, although a Magistrate, on the same footing as a Magistrate of Police acting in his Summary Jurisdiction. Act XXIX. of 1866 being still in force I must consider that the Commissioner of the Court of Requests when presiding in that Court, notwithstanding his magisterial qualification, must be governed and controlled by that Act in the exercise of his duties and his power. In the proceedings now before the Court he has unfortunately exceeded them, and therefore the *Rule Nisi* for bringing those proceedings into this Court in order that they may be quashed must be made absolute.

Rule absolute.

KHOO AING HONG *v.* MEYAPAH CHETTY. PUTEH *v.* KHOO AING HONG.

PENANG.

FORD, J. 1880.

Dec. 13.

On a charge under section 5 of the Pawnbroker's Ordinance 7 of 1872, it is for the accused to shew he has a license, and not for the prosecution to shew that he has not.

The Pawnbroker cannot prosecute for a breach of the Ordinance, committed before the term of his exclusive privileges, and during the time of the previous Pawnbroker.

Prosecutions under the Pawnbroker's Ordinance are, by the Ordinance, impliedly confined to the Pawnbroker, or a person acting as his informer on his behalf as his *Chinting* or Revenue Officer.

These were two appeals from the decision of F. H. Gott-

lieb, Esq., Magistrate, under the Pawnbroker's Ordinance 7 of 1872. The respondent in the first case, Meyapah Chetty, and Puteh, the appellant in the second, were severally charged with carrying on the trade of a pawnbroker without a license, under Section 5 of the aforesaid Ordinance. In the first case, it appeared that the carrying on of the trade by the respondent, had taken place during the time the previous pawnbroker had the exclusive privilege of taking pawns, and that the present appellant had become pawnbroker, only after such "trade" had ceased to be carried on by the respondent. The pawnbroker—the prosecution—also, in this first case, omitted to shew that the respondent had not a license. On objection taken on these grounds before the Magistrate, he dismissed the charge in the first of these cases, and the present first appeal was against that acquittal. In the second of these appeals, it appeared that the trading occurred within the term of the present pawnbroker's privileges, but the prosecution again omitted to prove that the appellant [Puteh] had not a license. On this objection being taken before the Magistrate, he overruled it, holding the onus of proving the license was on the prisoner [appellant], and convicted him of the offence. These appeals now came on together. In the first of them the case was remitted to the Magistrate to state his grounds for dismissing the case; this having been done, the appeal now came on for hearing.

Thomas for appellant in the first case, and respondent in the second, contended that as regards the second appeal the Magistrate was right in holding the onus to be on the prisoner, but was wrong in holding the contrary in the first appeal, and cited 3 *Russell on Crimes*, 366; *Paley on Convictions*, 45; *Rex* v. *Turner*, 5 M. & Sel. 206, *Elkin* v. *Janson*, 13 M. & W. 655, and *Pedgrift* v. *Chevallier*, 29 L. J. M. C. 225, and as regarded the right of the present pawnbroker to prosecute for an offence previous to his time, he contended that it was a fallacy to suppose the Act meant to limit particular breaches of the Act, as punishable only during particular periods. The Act relating to pawnbroking was one and the same Act during the term of exclusive privilege of both farmers, and no sooner the breach of the Act came to light, anybody who chose to prosecute, could do so. Prosecutions under the Act were not necessarily confined to the pawnbroker.

E. W. *Presgrave* for the respondent in the first case, and appellant in the second, contended that as it was essential to the offence that the trading should be without a license, no offence was shewn until there was evidence, however slight, that the prisoner had no such license. It was contrary to the first principles of law, to hold a prisoner to prove himself not guilty, before he is shewn to be guilty. In fact the presumption was in favor of his innocence. He referred to 1 *Taylor on Evidence*, [2nd ed.] p. 325, and submitted the cases cited by the other side, did not go the whole length of this case, and were distinguishable as being under statutory enactments, which had placed the burden of proof,—the positive of the issue,—on the accused. As regarded the right of the present pawnbroker to prosecute, he contended the Act was intended to protect the right of a particular person—the

FORD, J. 1880.

KHOO AING HONG v. MEYAPAH CHETTY.

PUTEH v. KHOO AING HONG.

pawnbroker—who held the monopoly of taking pawns—that monopoly was broken into by the respondent, as against the previous pawnbroker: the monopoly of the present pawnbroker had not been in the least affected. The Act really confined prosecutions to pawnbrokers, for breaches of the Act during their own privileges, by making one-half of the fine go to the pawnbroker as compensation for the wrong done to him, sec. 25—here, no wrong was done to the appellant, the present pawnbroker, and he was entitled to no compensation, and could not prosecute, as if his privileges were affected.

Thomas in reply, submitted the payment of compensation had nothing to do with the right to prosecute; in fact compensation could only be paid if the Magistrate so thought fit. Even if wronged, the pawnbroker was not entitled to compensation, but the "informer" was—and then even, the "informer" was not entitled, as of right, to compensation, but was dependent on the good will of the Magistrate. The section for compensation therefore had no bearing on the question raised—or if anything, one adverse to the respondent, as it spoke of an "informer," shewing any body could do so, and prosecute.

Cur. Adv. Vult.

16th February, 1881. *Ford*, J. held, that as the possession of a license was a fact peculiarly within the knowledge of the person charged, and not within the pawnbroker's, as he did not grant such licenses,—the affirmation of the issue, and onus of proof was on the prisoner, and this case was not distinguishable from *Rex* v. *Turner*, cited by Mr. Thomas, and as regarded the right of the present pawnbroker to prosecute, such right was impliedly confined to pawnbrokers, or persons informing on behalf of the pawnbroker, as his *Chinting* or Revenue Officer the Informer, as it was his monopoly that was intended to be protected. The fact that the present pawnbroker was not the pawnbroker at the time the breach of the Ordinance was committed, was fatal to the prosecution, as no breach of the present pawnbroker's monopoly had occurred by the prisoner's act. The result would be, that the decision of the Magistrate would be affirmed in both the cases, and both appeals be dismissed.

Appeals dismissed.

WEE LALAH *v.* OH KAN
&
OH KAN *v.* TAN CHUAN.

PENANG.

FORD, J. 1880.

Dec. 13.

The Magistrate has no jurisdiction under section 44 of Ordinance 13 of 1872, to order a married woman to return to her husband, when she is not detained from him against her will, but of her own accord, will not do so. That section, in cases of married women, applies only to cases of such women detained by some one else, and against their will.

This was an appeal by the wife of the respondent Oh Kan, against an order of E. C. Hill, Esq., Magistrate, Penang, by which

he directed her to return to her husband, and if she refused to do so, for force to be used against her to compel her to do so. The respondent, Oh Kan, originally prosecuted the defendant Tan Chuan, for detaining his wife, the appellant Wee Lalah, from him, against her will: this case was dismissed by the Magistrate, it appearing that there was no detention by Tan Chuan or any body else, but the wife would not return to her husband of her own accord. On the dismissal of the aforesaid charge against Tan Chuan, the Magistrate made the order against the wife, which was now appealed against. The woman still refused, and gave notice of appeal,—on which she was allowed to go her way, on giving bail for her appearance, if required, after the termination of the appeal.

Van Someren for appellant contended that inasmuch as this Court had no jurisdiction to order a married woman to return to her husband—*Lim Chye Peow* v. *Wee Boon Tek*, Straits Law Reports, p. 282 [*a*]—it would not imply, from the language of section 44, such a jurisdiction in the Magistrate's Court, except by most express words.

D. *Logan* [*Solicitor-General*] for respondent, and in support of order, contended, that section 44 was really divisible into two parts—the first half for the protection of liberty of a man, woman or child; and the second half, for the protection of the rights of husband, parent or guardian.

Cur. Adv. Vult.

20th January, 1881. *Ford*, J. This case, robbed of the feature which originally attached to it, of a charge against the 1st defendant, of unlawfully detaining the 2nd defendant, [*Wee Lalah*,] from the custody of her husband, [*Oh Kan*]—such charge having been dismissed—resolves itself into the question, whether a Magistrate under section 44 of the Criminal Jurisdiction Ordinance 1872, has a power to compel a married woman, deliberately declining to live with, and wilfully remaining away from her husband, to return to him; or, in language nearer akin to our accustomed legal phraseology, whether he has a power to make and enforce a decree for the restitution of conjugal rights? The facts of the case are simply, that, on the case of unlawful detention failing against the 1st defendant, the 2nd defendant left the Court, and refusing to return to her husband, would by force have been compelled to do so, but for bail tendered, and this appeal made.

The section under which the Magistrate thought he had such a power, and was compelled to make the order, is as follows:—

PROTECTION OF FEMALES, &C.

"Upon complaint made to the Court of Quarter Sessions or to a Magis-
"trate on oath, of the kidnapping or abduction or of the unlawful detention of
"any man, woman or child such Court or Magistrate may on satisfactory
"proof of such kidnapping, abduction or detention, make an order for the
"immediate restoration of such man, woman or child to liberty, or of such

[*a*] *Civil Cases*, Vol. I. of these Reports, p. 236.

FORD, J. 1880.

WEE LALAH v. OH KAN & OH KAN v. TAH CHUAN.

"woman or child to her or its husband, parent or guardian or other person "having the lawful charge or government of such woman or child, and may "compel compliance with such order, using force if necessary."

And the argument which led the Court to that conclusion was, as set forth in the case, and adopted by the Magistrate—that if the legislature had not intended to give this power, the word 'woman,' as well as 'man,' would have been omitted from the latter portion of the section, which is otherwise unnecessary; the restoration to liberty alone, under the first portion of the section, securing all that is necessary, if the woman is herself willing to return to her husband; and that the confining the latter portion of the section to women and children, shews, "that the restoration was contemplated even against the wishes of the woman or child." The argument was more boldly embodied by the Solicitor—General, who put it plainly 'that the first half of the section was framed for the protection of the liberty of man, woman and child; and the second, for the protection of the rights of the husband, parent or guardian.' That this clause may contain a sentence of a directory kind beyond what is absolutely necessary, and thus create a little ambiguity, may possibly be true; and that it may be read in a way to convey to some minds an inference that the intention of the framer was, to create the jurisdiction contended for, is apparent, or we should not now have this appeal: but I am clearly of opinion, even on these assumptions, that no such inference can, upon well settled principles of construction, be properly drawn by a Court of Justice. I am also of opinion, a more natural, and perfectly good grammatical construction, can be given to the section, under which no ambiguity arises,—no such portentious conclusions present themselves.

The first general principle of construction which the Magistrate's decision contradicts is, that an important, novel,—and having reference to the fact that the Supreme Court has repudiated it—inconvenient jurisdiction, is not to be considered as given, unless by clear and unambiguous words, or by words which so plainly and necessarily imply such an intention, that no other reasonable construction can be given them. I need hardly say that no such clear and unambiguous words occur here; and not only do I fail to see any necessary implication of such a jurisdiction from the insertion of the word 'woman' in the sentence referred to, but I think, as I have said, the words of the section admit of a much more natural and reasonable construction. I see no reason for supposing the latter part of the section confines the 'force to be used' to cases of married women and children. The language seems to me, by its reference to one order only, to shew that the force to be used, *when necessary*, applies as much in the case of persons to be restored to liberty, as to their natural protectors; but inasmuch as persons are not so enamoured of being kidnapped or abducted as to require to be torn from their captors, it is against the captors, abductors, or detainers, the force is to be used; but even if the sentence did contemplate the use of force specially in cases of married women and children to be restored to their natural protectors, many cases, I think, may readily be con-

ceived, where something more than a mere restoration to 'liberty' might be desirable. I would instance such a case, by supposing the wrong doer to have confined a married woman at one end of Province Wellesley, or say at Teluk Cumbar in this Island, whilst her husband lived in Penang. The Magistrate might well think the kidnapper or abductor or detainer, should be compelled to do something more than turn her out of his door, and if he thought fit, compel her being brought back to that of her husband. This view, I think, sufficiently answers the argument of force in the case of the detention of a married woman being unnecessary, except as used *against* her, because restoration "to liberty" would be enough. Certainly such a view of the operation of the clause is to be preferred, to inferring from the use of a very natural, if not strictly necessary, collocation of such words as 'woman and husband,' to raise such a jurisdiction as is now contended for.

A simple division of the clause, which although headed, "Protection of Females, &c." [in difference perhaps to some modern theories as to the relative excellencies of the sexes, which would classify males under the *et cetera*,] and is clearly to protect by summary process, men, as well as women and children,—seems to me to obviate all difficulty. The first part may be construed as giving the Magistrate a power to order the restoration of such persons "generally to liberty," and the second part, in the case of married women and children, to their natural protectors; and for either of these purposes, force is to be used, if necessary, against the wrong doer.

This seems the clearer, when we consider what it is that puts the Magistrate in motion, the very foundation on which his action rests—kidnapping, abduction or wrongful detention; and not the protection of the husband from the volatile conduct of his wife. Again, an opposite construction would—nay, indeed has already presented, in the form of this adjudication, a state of things very difficult of conception, *viz.*, that of a person punished for the wrongfully detaining herself. Now, that a wife might unlawfully absent herself from her husband, is intelligible enough, and had the Ordinance given a jurisdiction to deal with such an offence, nothing could have been said against the adjudication. But how an offence, which in its nature [to say nothing of the additional force which such a word as "detention" gathers from its collocation with "kidnapping" and "abduction,"] involves the imposition of restraint on the person, can be committed by a person, on her own person, she having all the while perfect liberty to go where she likes—it is difficult to understand. Such a view of the mind of the Legislature, I think, brings us so closely to what looks like an absurdity, that I have no hesitation in applying to this case an equally well known principle of construction, as that before referred to, *viz.*, that all constructions which lead to such a result, are, if possible, to be avoided. For these reasons, the order of the Magistrate must be quashed; and it should in future be understood, that his jurisdiction under this clause, arises only when the man, woman or child is kidnapped, abducted

FORD, J. 1880.

WEE LALAH v. OH KAN & OH KAN v. TAN CHUAN.

or unlawfully detained, and not when a married woman, of her own free will, absents herself from her husband. The Magistrate has, from other sources, the power to enforce the parents or guardian's right to the custody of a child absenting itself.

MAMSAH *v.* MAHOMED LEBBYE.

PENANG.

WOOD, J. 1881.

June 17.

A Magistrate should not admit in evidence, even against a well known offender, evidence of general bad character of the accused. If he so do, the conviction is liable to be quashed.

This was an appeal against the decision of H. A. O'Brien, Esq., Magistrate, Penang. The appellant Mamsah, and one Bap, were charged with theft of certain property under section 379 of the Penal Code. The evidence against the appellant was, that he had been seen in company with the said Bap near the respondent's house at an unusual hour of the night, and shortly after, the respondent was awoke by hearing his ducks making a noise. On going out, he saw two men run off with some ducks and other property, and on giving chase, they dropped these down and made off. They were not arrested till the following morning. The appellant Mamsah, it appeared, had often been previously before the Magistrate, and had been convicted two or three times before, for similar offences. He was therefore known to the Magistrate, and in the course of this case, the Magistrate personally put certain questions to the witnesses who were called, as to the general bad character of the appellant, and his thievish propensities. The father of the appellant was also questioned by the Magistrate on this subject, and he admitted his son was "a bad boy," but went on to say that on this particular occasion he had not left his house. Other witnesses to prove this *alibi* were also called. The Magistrate convicted the appellant and sentenced him to 3 months' rigorous imprisonment.

Van Someren for appellant contended that improper evidence had been admitted, and that of a nature materially to affect the decision in the case, and the conviction should therefore be quashed. He cited *Regina* v. *Fuidge*, 33 L. J. M. C. 74.

No one appeared for the respondent.

Wood, J. I am of opinion that the Magistrate has improperly admitted evidence of the general bad character of the appellant Mamsah, and that this evidence, though slight, might have affected his decision. The fact that the answers were obtained by questions put to the witnesses by the Magistrate himself, shews there was some predisposition or knowledge in the Magistrate's mind, which was derived from sources ultra the evidence in this case. The other evidence against the appellant is also very slight, so that there is no likelihood, apart from the objectionable evidence, of his conviction, if I were to remit the case for rehearing. The conviction will therefore be quashed.

Conviction quashed.

ABBASS *v.* TOMBY.

PENANG.

WOOD, J.
1881.

July 25.

The act of a person in going into the house of another, with intent to have criminal intercourse with the latter's wife, although necessarily resulting in annoyance, or as an insult to the latter, is not an offence within sections 441 & 442 of the Penal Code.

This was an appeal against the decision of F. H. Gottlieb, Esq., Magistrate, whereby he convicted the appellant Abbass, of criminal house trespass under section 448 of the Penal Code, and sentenced him to two months' rigorous imprisonment and to pay a fine of $25. From the evidence it appeared that the respondent and his wife were living at Tanjong Tokong, and had so done for some 5 years. The appellant also lived at Tanjong Tokong. On the morning of 30th March, at 3 o'clock, the respondent got up to go out fishing, leaving his wife in the house. After going to the beach, the respondent returned home in about half an hour, and found the door of his house bolted: this he managed to undo, and on going in, found his wife in the appellant's arms, and both lying down. He laid hold of the appellant, and called for Police; the station not being far off, a Constable came, and the appellant was handed over to him, and taken to the station. The wife, on being asked by the Police how the appellant had been allowed to come in, replied, "I like him and let him in"—and the appellant also stated to the Sergeant at the station, that the respondent's wife liked him, and that was the reason why he went up. H. C. *Vaughan* of Counsel for the prisoner [the appellant] submitted to the Magistrate that the charge was not proved as it was no trespass when the wife allowed him to go in, and the prisoner's intention in going in was not to "insult, intimidate or annoy" the prosecutor. The Magistrate held the case fell within section 448, and convicted the prisoner as above stated. He now appealed.

Capel, for appellant, reiterated the objections taken before the Magistrate.

D. *Logan*, [Solicitor-General] for respondent.

Wood, J. The facts of this case clearly shew that the object of the defendant was to have criminal intercourse with the prosecutor's wife, and not, primarily, to commit any other offence, or to intimidate, insult or annoy any person, except in so far as the effecting of his object might,—as it would no doubt, if discovered,—insult and annoy the prosecutor. But to justify a conviction under sections 441 & 442 of the Penal Code, it is necessary to shew that the object of the prisoner was, primarily, to annoy and insult. In the present case it is obvious his object was to effect his purpose secretly, and so as by concealment, to give prosecutor no cause for annoyance or insult. To punish the prisoner for this class of offence, was, in effect, to punish adultery in an indirect manner. In matters of this description, the proximate, and not the remote object or intent, must be looked at. The conviction will therefore be quashed.

Conviction quashed. [*a*]

[*a*] See also *Reg.* v. *Kadir*, Criminal Rulings. Vol. II. of these Reports. p. 105.

TEK WEE *v.* OPIUM FARMER.

PENANG.
WOOD, J.
1881.
Aug. 22.

Before a person can be convicted of "knowingly being in possession of illicit chandoo," it must be shewn affirmatively, by direct and reasonable evidence, that the place where the chandoo was found, was occupied by him, so that the things, in such place, must be under his control or custody.

Therefore, where it was shewn that certain chandoo was found hidden away in a room in which the prisoner was found at the time of the search, but it was not shewn that he was the occupier of the room, but merely had access thereunto along with many others,

Held, there was not that direct and reasonable evidence of the chandoo being in his control or custody, and the conviction was quashed.

An illegal entry into a house, in search of illicit chandoo, although it might be the subject of an action, does not make the finding of any chandoo illegal, and so as to render the "possession" of such chandoo, no offence.

This was an appeal from the decision of F. H. Gottlieb, Esq., Magistrate of Penang.

Van Someren for appellant.

Kershaw for respondent.

Van Someren took a preliminary objection that certain documents appended to this case were not properly part of the case, as being added without authority. 1. A letter to the Registrar from the Magistrate. 2. An amended conviction.

1. The letter to the Registrar is an informal and valueless document.

2. It is too late after the case is once stated and actually filed in Court, for the conviction to be amended, even on payment of costs. The point was raised, but not decided in a former case, *Narainasawmy* v. *Mariapen*, [*a*]. This case is quite different. Here the case is stated under section 18 of the Appeals Ordinance 12 of 1879, sub-sec. 1.

The case was stated and was set down for argument on Monday, August 15th, and the amended conviction was sent up on Tuesday, August 16th. There is *locus penetentiæ* up to the statement of the case, but no longer or further time. Appeals Ordinance 12 of 1879 does not touch the matter. The English Act 20 & 21 Vict., c. 43, sec. 2, and by our Ordinance, sec. 18, sub-section 1, a copy of the conviction is to be supplied. The duty of the Magistrate is to send up the conviction, which he has done,—but he has attempted to amend it afterwards, which he cannot do. By section 21 of Ordinance 12 of 1879, the Court should send down the conviction to be amended, if it considered it capable of amendment, and the duty vested with the Magistrate to amend on the discretion of the Court, not of his own mere motion. The first conviction is bad, as it omits to state the name or title of the convicting Magistrate. For all that appears on the conviction, the convicting Magistrate might have been a Magistrate for Sumatra or elsewhere. *Paley on Convictions* [ed. 1866] p. 181. Generally when a conviction has been returned, it is too late to amend. Act 12 & 13 Vict., c. 45., *Regina* v. *Inhabitants of Hellingley*, 28 L. J. M. C. 167.

Kershaw contrà, relied on section 32 of the Appeals Ordinance 12 of 1879, as authorizing an amendment.

[*a*] 31st October 1879, *antè* p. 120.

[*Wood*, J. I incline to think that the Court has, under the powers given by section 32, sub-section 1, power to send down the conviction to be amended by the Magistrate in this matter.]

Van Someren thus addressed himself on the merits of the case. The facts of the case, as stated by the Magistrate, shew he had no jurisdiction to convict,—and again, that the evidence which shews at most possession of 3 pots, cannot support the entire conviction of stealing 5 pots of chandoo. *Paley*, p. 225. There is doubt if there is any proof of possession, and also whether defendant had any "knowledge"—"knowingly has them in possession" is defined by the Excise Ordinance 4 of 1870,—"possession" as "actual possession, custody or control by himself, or any other person." Here it is shewn by the evidence that many others besides the prisoner, had access to the room in which the chandoo was found. He is not shewn in particular to be an occupier of the room more than the other persons. There can be no finding of the chandoo in defendant's person, unless the search be legal. Section 74 of Ord. 4 of 1870, shews the circumstances under which the Magistrate may grant a warrant, and what the officer may do. Here the warrant was to search premises No. 27, Campbell Street, and they in fact, as the case shews, searched premises No. 27, Buckingham Street,—and so there can be no jurisdiction, if there was no proper search.

[*Wood*, J. I incline to think that a wrong entry,—although it might be the subject of an action,—does not make the finding illegal, and so no offence; added to which, the facts do not shew that the officer ever made use of his warrant in entering the house, but entered by consent of the appellant.]

Kershaw pointed out section 79 of the Excise Ordinance 4 of 1870, and contended that there was reasonable evidence of the chandoo being in the appellant's control or custody, and as the Magistrate had convicted him on the evidence, the Court would not upset that decision.

Wood, J. I am of opinion that the conviction must be quashed on the merits, on the ground that direct and reasonable evidence was not shewn on the part of the prosecution, that the chandoo taken was chandoo in the control or custody of the prisoner, the appellant. It should have been shewn affirmatively, that he was the occupier of the chamber in which he was found,—in such a way as to shew that the things in that room were under his control or his custody.

Conviction quashed. No order for costs.

MAT ISSAH *v.* MAS ETAH.

PENANG.

WOOD, J. 1881.

October 31.

A claim set up by a prisoner to property which is alleged to be stolen or criminally misappropriated, does not oust a Magistrate of his jurisdiction, unless the claim be *bonâ fide* raised.

Where, from the case as sent up, it was doubtful whether a witness, the wife of the prisoner, was called for the prosecution or defence; and on appeal the prisoner alleged she was called by the prosecutor, and the prosecutor alleged she was called by the prisoner, and the Magistrate had no recollection on the point, but subsequently believed she was called by the prisoner, and then, for the first time, in a foot-note to the case, stated she "was called for the defence"—both prosecutor and prisoner being prepared to file affidavits by themselves and others in support of their respective allegations,

Held, as the evidence of the wife, if called by the prosecutor, would clearly be inadmissible, and her evidence was of a material kind, that the conviction ought to be set aside, and the prisoner tried afresh.

This was an appeal from the decision of Urban Bruce, Esq., acting Magistrate, Province Wellesley.

On the 9th September, 1881, Mat Issah, the appellant, was convicted "for having on the 24th August dishonestly misappropriated one mattress, value $10, and three mats, value $3," under section 403 of the Penal Code. It was proved by the evidence that the prisoner and his wife named Rasimah, had been living in the house of the prosecutrix, the mother of Rasimah, that the prisoner and his wife had a quarrel, and that the prisoner was shortly thereafter seen to take away the articles mentioned in the charge, from the prosecutrix's house. The prosecutrix swore that the goods removed were her property. The prisoner when spoken to by a witness who saw him removing the goods, replied: "I do not care," and when afterwards spoken to by a policeman, admitted having taken them, but said they were his, and that he had removed them in consequence of having had a quarrel with his wife. From the manner in which the prisoner cross-examined the witnesses for the prosecution, his defence appeared to be that the goods taken were actually his own property, though in opening his defence, he did not take this ground, but made some statements which were apparently irrelevant.

The Magistrate, in the case stated by him, after giving the statement of the prisoner, added these words: "The following evidence was taken for the defendant," and then followed the evidence of four witnesses. The evidence of the first three of these witnesses went to shew that the goods taken by the prisoner were his own property. The last of the four was Rasimah, the prisoner's wife. Her evidence was to the effect that the goods in question were the property of the prosecutrix, and not the prisoner's.

Van Someren for the appellant.

Kershaw for the respondent.

Van Someren. The conviction is bad on four grounds. *1st.* The evidence shews that a question of title to the subject-matter of the theft was raised by the defendant, and not merely raised, but fairly supported. *Maxwell on Magistrates*, 8; *Paley on convictions*, [6th ed.] 143 *et seq.*, *2nd.* The evidence of the defendtan's wife, Rasimah, was inadmissible, and, being adverse to

prisoner, might reasonably be held to influence the Magistrate in his decision. By Indian Act II. of 1855, section 20, the wife can only be called for or against the husband in civil proceedings. The Ordinance 20 of 1870, section 28, allows the prisoner, a husband to call his wife, or a wife to call her husband, in criminal proceedings. *3rd.* the name of the owner of the property alleged to be stolen is not mentioned. *Rex* v. *Sill*, 17 Jur. [O. S.] 22, s. c. 21 L. J. M. C. 214, Dears C. C. 110; *Paley on Convictions*, 199; *Rex* v. *Ward*, 7 Cox C. C. 421. Section 32 of the Appeals Ordinance, 1879, does not give the Court any power to amend. *4th.* This is, if anything, theft, and not dishonest misappropriation, and so the man should have been found guilty of theft and not of misappropriation.

Kershaw for the respondent. The conviction is supported by the evidence and should be affirmed.

[*Wood*, J. On the 1st point urged for the appellant, I am in favour of the respondent. You must therefore confine yourself to answering the remaining three points urged for the appellant.]

As to the 2nd point raised by the appellant, the prisoner's wife was called in order, after the first witness for him, and so it must be held the prisoner called her.

As to the 3rd point, it is submitted that it is not necessary to state in the conviction the name of the owner of the property alleged to have been misappropriated. The form of conviction is given in Schedule C to Ordinance 13 of 1872, and makes no mention of ownership. Further, even if the ownership should have been stated in the conviction, its omission is merely a formal defect, and the Court will send back the conviction to be amended in this respect, under sections 32 & 33 of the Appeals Ordinance 2 of 1879.

As to the 4th point, the prisoner may well be found guilty of misappropriation, though the evidence would support a charge of theft.

Van Someren in reply, referred to section 34, sub-section 2.

Wood, J. The assertion is made by prisoner that the Magistrate called his wife. The prosecutrix asserts that the wife was called by the prisoner. The Magistrate appears to have stated that he does not recollect. These facts are not set out in the case, but appear from the statements of the respective Counsel during the course of the argument. The case must be remitted to the Magistrate to ascertain by whom the woman, the wife of the prisoner, was called. The ultimate decision will stand over until this matter is decided.

November 7th. The Magistrate having returned, in a footnote to the case as stated, that the witness "Rasimah was called for the defence," and Counsel on both sides intimating they could each file affidavits in support of their respective cases,

Wood, J. The Counsel on either side state that the parties concerned are prepared to make contradictory affidavits on this point, and I am of opinion that there was material ground for suspecting that the prisoner must have been well aware of the adverse feeling of his wife on the matter in dispute. I therefore

WOOD, J. 1881.

MAT ISEAH v. MAS ETAH.

think that in this case it is by no means clear that the wife was in fact called by the prisoner. The case supplied by the Magistrate should, under section 18, sub-section 1 of Ordinance 12 of 1879, so far as evidence is concerned, be a copy of the evidence as taken by him, by which I understood a copy of his written notes of evidence. Here the copy of his notes does not supply the fact of whether the prisoner's wife was called by him, and I think it would be contrary to the spirit and intention of the Ordinance, that the written evidence should be supplemented by a note which was not made at the time, and in writing, by the Magistrate.

I am also inclined to think that the evidence was appropriate rather to a charge of theft than of misappropriation, I therefore remit the case to the Magistrate to be tried afresh, and recommend that care should be taken that the evidence of the wife should only be taken on her being called by the prisoner, if he should choose so to do. I also hold that the Magistrate had found no *bonâ fide* claim or title had been in fact shewn, and uphold his decision on that ground.

Order accordingly.

LIM CHOW LENG *v.* OPIUM FARMER.

PENANG.

WOOD, J. 1881.

NOV. 14.

Where a Magistrate awarded a penalty against a prisoner, and after the Court had risen, changed his mind, and ordered the fine to be reduced,

Held, he had no power to do so, and the conviction for the original amount was sustained.

A conviction which is not sealed with the Magistrate's seal of office, is not liable to be quashed, as the defect is only formal and may be amended.

The Information in an Excise case, and commitment of a person to Jail, are no part of the appeal case required to be stated under section 18 of the Appeals Ordinance 12 of 1879.

The appellant had been convicted by Urban Bruce, Esq., acting Magistrate, for knowingly having in his possession illicit chandoo. The evidence shewed that the appellant had been suspected for some time of dealing in illicit chandoo and had been often warned—that on the day in question the Police and Revenue Officers entered his house under a warrant, and on searching, found a bottle of illicit chandoo hidden in the bath room at the back of appellant's house. In his house were found pipes, some still warm, as if lately used, a pair of scales for weighing chandoo and a little farm chandoo. The appellant contended the bottle must have been placed there by somebody else without his knowledge. It was shewn the bottle could not have been placed from outside, in the place where it was found; and there was no evidence to shew that others had access to the bath room, save the appellant and his wife. The appellant was fined $500 at the conclusion of the case on the 10th September. On the 12th, the Magistrate, for some reason or other, considered the fine excessive, and wrote to his clerk to reduce the fine to $200. The Magistrate certified the

reduction of the fine in a foot-note to the appeal case stated by him, but the formal conviction sent up with it, as part of the case, stated the fine to be $500. The commitment of the appellant to prison [but which was not attached to the case] stated it was in default of payment of a fine of $200. The conviction was signed by the Magistrate, but, as is usually the case, did not bear his office seal. It also concluded after stating the offence that "the Magistrate adjudged the appellant to pay the fine of $500." It omitted to state that this fine was in respect of such offence. The name of the Magistrate did not appear in the body of the conviction—it stated the appellant was convicted "before the undersigned Magistrate," and was signed by the Magistrate as already stated. The information on which the warrant was granted was not attached to the case. The Opium Farmer was a witness, but did not say he was the prosecutor. The appellant filed an affidavit stating the changes in respect of the fine imposed.

F. H. *Gottlieb* for appellant objected that it did not appear in evidence that the Opium Farmer, who was ostensibly the prosecutor in the case below, was in fact such prosecutor.

[*Wood*, J. That objection is untenable, as the Opium Farmer is directly or indirectly injured by any invasion of his monopoly, and the question of direct injury to the Opium Farmer is not material.]

Gottlieb then applied that the information upon which the search warrant was granted should be returned into Court as being part of the proceedings in the case. He contended 1st, it was part of the proceedings as being the foundation for the Magistrate's jurisdiction. 2nd, it was not excepted by any provision of the Excise Ordinance 4 of 1870, section 94, as amended by Ordinance 15 of 1871.

[*Wood*, J. Inasmuch as section 2 of Ordinance 15 of 1871, amending section 94 of Excise Ordinance 1870, enacts that *no information* shall be admitted in evidence, it would seem that the information is no part of the proceedings before the Magistrate within the meaning of the Appeals Ordinance of 1879, section 18, sub-section 3].

Gottlieb. The appeal is on two grounds: the one technical, and the other on the merits. 1st. The *technical objections*. The commitment is irregular.

[*Wood*, J. The commitment forms no part of the proceedings in this case, and is not material to the enquiry.]

2nd. The conviction is not in the form given by section 74 of the Excise Ordinance, as containing the name of the convicting Magistrate in the body of the conviction.

[*Wood*, J. Although the form in Schedule R of Ordinance 4 of 1870 is not followed, this form is permissive only, and need not be followed, and it is sufficient if the name of the Magistrate appears in the conviction.]

3rd. Although the conviction states that appellant was convicted of such and such an offence, and gives the clause awarding the penalty, yet it is not stated that this punishment is awarded in respect of that offence. *Paley on Convictions*, [6th Ed.], 264.

WOOD, J. 1881.

LIM CHOW LENG v. OPIUM FARMER.

[*Wood*, J. That reference does not apply to any adjudication of *punishment*; and if it did, the error, if any, is formal only.]

4th. It does not appear that the conviction is sealed. The seal is indispensable, and it is necessary that the Court should be informed of this fact in order to see whether there is any conviction.

5th. The conviction is uncertain as the penalty thereby shewn is not the same as stated in the Magistrate's certificate.

[*Wood*, J. The conviction on the face of it, and the amount of punishment thereby awarded are certain and definite.]

The merits. 1st. There was no actual possession shewn under section 80. It is requisite that the illicit opium be in actual *possession*, *custody* or *control* by himself or any other person.

[*Wood*, J. There is ample evidence it was so, and this matter of fact is sufficiently found by the Magistrate.]

2nd. Apart from the formal conviction, it is uncertain what the fine is—[*Gottlieb* here read the affidavit of the appellant.]

Van Someren for respondent. The only objection requiring to be answered is, 1st, the want of the seal, and next the change in the fine. The want of the seal is, at most, mere *want of form*. The form given by the Act does not require a seal, and the mistake, if mistake it be, can be amended by sending the conviction to the Court below for amendment, by fixing on the seal—Section 3 of Police Act XIII. of 1856. This section is unrepealed, and is applicable—also section 32 of Ordinance 12 of 1879 which is directory. As regarded the fine, the Magistrate having awarded the penalty, could not, after the Court had risen, alter it. He was *functus officio*, and the conviction rightly states the fine according to the amount originally awarded. The notice of appeal also states certain grounds of appeal; and if these are stated, though not required, the appellant cannot be allowed to raise others he has not then taken. *Tayler on Appeals*, 40, 63.

Gottlieb in reply.

Wood, J. I can see no grounds for interference with the decision of the Magistrate and must uphold the conviction. As regards the penalty, the appellant can lay his case before His Excellency the Governor in Council, when no doubt he will get the fine reduced, if the Council see fit.

Conviction affirmed.

MERICAN & ORS. *v.* MAHOMED.

PENANG.

WOOD, J. 1882.

February 24.

A Magistrate who has tried and adjudicated on a case, cannot import his knowledge of the facts thereof, acquired in such case, into a cross case by the same parties, concerning the same occurrence; but is bound to hear the whole of the evidence *de novo*, and adjudicate thereupon, otherwise the conviction is liable to be quashed.

Van Someren had obtained a rule calling on C. W. S. Kynnersley, Esq., Magistrate, and Mahomed, the respondent, under

section 18 of the Appeals Ordinance 12 of 1879, to shew cause why a case should not be stated for the opinion of this Court. It appeared that the Magistrate had tried a previous case between the parties in which the respondent was then defendant, and had bound them over to keep the peace. When the cross case came on, he took only the prosecutor's [the present respondent] statement, and then with his knowledge of the facts as previously shewn, convicted the three defendants [the appellants] and bound them to keep the peace.

Mr. *Kynnersley*, the Magistrate, now appeared in person to shew cause: "The reasons I refused to state a case were, that the original case, a case of *Rasnai* v. *Mahomed and two others* [the charge was attempting to cause grievous hurt,—Mr. Anthony was Counsel for the prosecutor]—after going fully into the case, I was of opinion that both parties were equally to blame, and that there was a fight in which a large number of persons were concerned. The defendants in that case had been arrested on a warrant. One of the defendants, the present respondent, informed me that he had taken out a summons against prosecutor in that case [the present 2nd appellant] and nine others. I then bound over the three defendants in the original case, to keep the peace, and said that when the summons case came on, in which the same facts would be adduced, I should bind over those defendants. During my absence, the summons case came before Mr. Bruce, the acting Magistrate, and he dismissed it. I did tell the first defendant in the first case [the present respondent] that he need not bring his witnesses over again, and for want of such evidence, I understood the case had been dismissed by Mr. Bruce. He complained to me, and I directed him to lay an information, which he did,—and fresh summonses were issued to the defendants [the present appellants] and the case came before me. The summons was to shew why they should not be bound over. Complainant [the present respondent] went into the box, and after hearing him, I bound over the defendants to keep the peace. The evidence he then gave, is contained in my written statement. It is true that I did not allow the case to be adjourned in order to enable defendants to call witnesses. I told defendants I had heard the case before, and knew all the facts of the case, and there was no necessity to hear it over again."

The *respondent* appeared to shew cause in person but added nothing further.

Van Someren in support of rule was not called on.

Wood, J. The rule will be made absolute, for the statement of a case by the Magistrate.

24th April. The case having been stated, the appeal now came on for hearing.

Van Someren for appellant referred to the facts and the Magistrate having imported into the case knowledge acquired by him in a previous case, and submitted the convictions could not be supported, and the bonds would be cancelled.

Wood, J. This case was heard on a previous application, and now comes on for final hearing. The facts attending the hearing

WOOD, J. 1882.

MERICAN & ORS. v. MAHOMED.

were then stated by the Magistrate, and on those facts together with the facts appearing in the case as now stated, which are to the same effect,—I am of opinion that the conviction should be quashed, and the bonds cancelled.

Convictions quashed.

MUNICIPAL COMMISSIONERS

v.

CHUAH SENG & ORS.

PENANG.

FORD, J. 1882.

May 23.

The mere keeping of pigs in one's premises, is no offence under the Conservancy Act XIV. of 1856, and Ordinance 2 of 1879: to bring the case within section 43, it must be shewn the premises are "in or near any street," and such "street" is within the prescribed limits.

Where a person is charged with doing an act without a license, but the existence or non-existence of such license is peculiarly within the knowledge of the prosecutor, it is for the prosecution to shew the prisoner had no license, and not for him to shew he had one.

A conviction which states a prisoner is ordered to pay costs, but omits to state the amount, is bad and liable to be quashed.

Semble. Such an error might be amended, by the case being remitted to the Magistrate to state a definite amount.

Query. Has the Magistrate power to fine for costs, on convictions for offences other than under the Police Act XIII. of 1856?

A prisoner held a license for a slaughter-house,

Held, such license necessarily implied a right to keep pigs for the purpose.

A prisoner who pleaded guilty to a charge which stated no offence in point of law, and against whom the evidence also disclosed no offence, was permitted to appeal against the conviction and sentence thereby following, and such conviction was quashed.

These were six separate appeals from the decision of Urban Bruce, Esq., acting Magistrate, and were all heard the same day in succession. The appellants were severally convicted of "keeping pigs on their premises without a written license from the Municipal Commissioners." The respondent was one R. C. Nickelsen, an Inspector of Nuisances in the employ of the Municipality. The facts of each case were as follows: The evidence against the first appellant was that of the Inspector only, who stated that on the 4th February about 9 a.m., he visited premises No. 44, Market Street, and found 4 pigs, that the defendant had been convicted twice before. This was all the evidence against him. In his defence he admitted he kept the pigs for one night, but called no witnesses. He was fined $10 and costs. The conviction omitted to state the amount of costs. The evidence against the 2nd appellant, was also by the Inspector, that his premises, No. 452, Beach Street, had been visited in the same way, and 40 pigs found therein—the appellant owned the pigs to be his—he had been previously fined, and had no license. He was fined $8 and costs—the conviction here also omitted to state the amount of costs. The evidence against the 3rd appellant was also by the

Inspector, that his premises No. 283, Beach Street, had also been visited and 10 pigs found—that he admitted the pigs were his—he had been convicted before, and had no license. He was also fined $8 and costs—the conviction having the like omission. The evidence against the 4th appellant was also by the Inspector, that his premises No. 346, Beach Street, had also been visited and several pigs found therein—he had been fined before. On the hearing of the appeal, this defendant produced a license from the Commissioners to use such premises as a slaughter-house for the current year, which license was admitted on behalf of respondent. He was also fined $8 and costs, the conviction having the like omission as the others. The evidence against the 5th appellant was also by the Inspector, that his premises No. 62, China Street, were also visited and 4 pigs found therein—he had been fined twice before. He was also fined $8 and costs, the conviction omitting the amount of costs. The 6th appellant pleaded guilty to the charge which was as follows: "Keeping pigs on your premises "without a license from the Municipal Commissioners, an offence "punishable under section 43 of Police Act XIV. of 1856, as "amended by Ordinance 2 of 1879." The Inspector was however called, and stated, that this defendant had 6 pigs and had been twice before convicted. He was also fined $8 and costs, the conviction omitting to state the amount of costs.

Van Someren for appellants. As against No. 1, there are five objections. *1st.* There was no evidence to bring the case within the section 43 as amended. It is an offence to have pigs in premises "in or near any street" but not otherwise—that expression, as well as "street" are defined by the Act XIV. of 1856, section 2, and Ordinance 2 of 1879, section 2, and the "street" must be within certain prescribed limits. There is nothing to shew it is so in this case. *2ndly.* No evidence was given that he had not a license. It is true he must be aware that he has one or not, but it is for the prosecution to prove he had not one, as the Commissioners were aware also of the fact, as they grant and withhold licenses, and could have proved it. That takes the case out of the general rule that the defendant ought to prove such a thing, as the rule applies only in cases where that fact is peculiarly within the defendant's knowledge. This distinguishes this case from the one lately before the Court by the pawnbroker against Meyapah Chetty, as there the pawnbroker does not grant licenses [*a*]. *3rdly.* Wrongful admission of evidence, *viz.*, the previous convictions. *4thly.* The Magistrate had no power to order payment of costs. His power is under section 102 of the Police Act XIII. of 1856, but that is limited to cases under that Act, but not under any other Act as this one, under Act XIV. of 1856. This point was raised, but not decided, in *Mahomed Aniff* v. *Ebram Khan* before Mr. Justice Phillippo [*b*]. *5thly.* If the Magistrate had the power to fine for costs, he has exercised it, so as to make the sentence void and the conviction bad; the con-

[*a*] *See* Khoo Aing Hong *v.* Meyapah Chetty and Puteh *v.* Khoo Aing Hong, *ante* p. 124.

[*b*.] *ante* p. 88.

FORD, J. 1882.

MUNICIPAL COMMISSIONERS v. CHUAH SENG & ORS.

viction does not state the amount of costs. *Mahomed Aniff* v. *Ebram Khan* [a]; *Maxwell on Magistrates*, 31.

As regarded 2nd appellant, he urged objections 1, 3, 4 & 5.

Do. 3rd do , the same 1, 3, 4, 5.

And as regarded the 4th appellant, he urged objections 1, 2, 3, 4 & 5, and also, that he having a license for a slaughter-house, it implies he could have pigs for a reasonable time at least, in his possession in order to slaughter, and carry on his business.

[*Ford*, J. A license to keep a slaughter house necessarily implies a right to have pigs on the premises at least to slaughter].

As regarded the 5th appellant, he urged objections 1, 2, 3, 4, & 5.

As regarded the 6th appellant, the same objections 1 to 5 inclusive, and further although he had pleaded guilty, that it was to a charge which stated no offence, and could now be appealed against. *Rex* v. *Little*, 1 Burr. 610, and neither did the evidence shew any offence.

Ross for respondents admitted the convictions were bad on all the points taken, but contended the proper course was, to remit the cases back to the Magistrate for further evidence, and amendment generally.

Ford, J. In these cases the errors in procedure are so many and palpable, that I consider it would have a tendency to foster carelessness and ignorance on the part of Magistrates, for the Court to rectify the mistakes, and inasmuch as appellants have been put to considerable expense, at least equal to the fines imposed, the Court will quash the convictions in the hope that more care will be taken for the future.

I am clearly of opinion that the street in which the premises are, must be shewn to be within the prescribed limits of the Commissioners' authority, and also that evidence as to the appellants having licenses, is in these cases, peculiarly within the knowledge of the prosecutors, and they should prove, by production of their books, that the appellants have not got licenses. On the third point, I am not clear that previous convictions were proved before the Magistrate, but in some way he seems to have taken them into account. In my judgment he should not have done so until the appellant's previous conviction had been properly proved. I don't propose however to quash the convictions on this ground as I am not clear as to what took place before the Magistrate. I quash the convictions also on the 5th objection as the Magistrate must state what sum the prisoner has to pay. If the case had been brought to appeal only on that ground, probably it could have been sent back for the Magistrate to state a definite sum; but as I have determined to quash the convictions on the 1st and 2nd grounds, I shall quash them also on the 5th. I give no judgment on objection 4, nor on 3, as I am doubtful what actually took place before the Magistrate. The convictions in appeals 1, 4, 5 & 6 will be quashed on objections 1, 2 & 5. In appeals 2

[a] *antè p.* 88.

& 3, on objections 1 & 5 only. In the 4th appeal, the conviction will also be quashed on the merits. The fine and costs must be remitted.

Convictions quashed—fine and costs remitted.

FORD, J. 1882.

MUNICIPAL COMMISSIONERS v. CHUAH SENG & ORS.

REGINA *v.* LIM A. SI & ANOR.

PENANG.

FORD, J. 1882.

May 23.

The appellants were convicted of theft of Government timber. The evidence that the timber was cut in British Territory was very unsatisfactory,

Held, the conviction could not be sustained. Even if the trees were felled in British Territory, yet, as there was nothing to shew that the appellants knew they were trespassing, the conviction could not be sustained, as no *animus furandi* could, under the circumstances, reasonably be implied.

The appellants were convicted by J. K. Birch, Esq., Magistrate of Province Wellesley, of theft of Government timber. It was alleged by the prosecution that the trees were felled at Bukit Tongal, which it was further alleged, was part of Province Wellesley. The men on seeing the Forest Ranger and Police arrive, ran off; two however were subsequently captured, but there was no evidence to identify them with the appellants. The Forest Ranger and another witness [a ryot] stated, the cutting was in British Territory, or Province Wellesley slope of Bukit Tongal. The appellants stated they were cutting only small wood but were not on Government ground.

Thomas for appellants contended there was no evidence of identity; nor to shew that the men were cutting in British Territory.

Ross [for Solicitor-General] on behalf of the Crown.

Ford, J. Send back the case, for the Magistrate to take evidence of identity of prisoners with the two men arrested and to take evidence of their not having been in Kedah, but in British Territory, and as to whether prisoners were acting under a pass from the Kedah authorities or not.

The case was accordingly remitted and further evidence taken by the Magistrate. The further evidence clearly identified the appellants as two of the men cutting the trees, but, made it even more doubtful than before whether the spot was in British or Kedah Territory.

28th August, 1882. The appeal now came on for further hearing before *Wood*, J.

Thomas for appellants.

Ross for Crown.

Wood, J. After reading the new evidence sent up by the Magistrate, I am of opinion that the whole of the evidence in the case does not support a conviction of theft. It is by no means clear that the land is in British Territory; but even if so, it is not

FORD, J. 1882.

REG. v. LIM A SI & ANOR.

shewn that the appellants had reasonable means of knowing that they were committing a trespass—it would therefore be unreasonable to imply in them, the commission of any act, *animo furandi.*

Conviction quashed.

PUNGHULU ALLANG *v.* HIM.

PENANG.

WOOD, J. 1882.

June 26.

In a Magistrate's appeal under section 18 of the Appeals Ordinance 12 of 1879, the only parties to the appeal are the prosecutor and prisoner, the parties in the Court below.

Neither the Crown, nor the Magistrate, is a party thereto; and have no *locus standi* to be heard, as of right, in such appeal.

The appellant Punghulu Allang, was convicted by J. K. Birch, Esq., Magistrate of Province Wellesley, of cheating. On the appeal being called on,

Van Someren, who held the brief of the Solicitor-General, stated he appeared on behalf of the Solicitor-General and for the Crown.

Ross took a preliminary objection that Mr. Van Someren could not be heard, as the Solicitor-General had no *locus standi*, nor had any Counsel in supporting a conviction. The Solicitor-General or other Counsel may appear and watch the proceedings, but unless he appears for the respondent, no Counsel has a right to appear at all. The Solicitor-General has no *locus standi* to appear for the Magistrate or the Crown. By the Appeals Ordinance 12 of 1879, section 18, clauses 1, 2 & 3, and sections 19, 20 & 29, it appears that when the case is once stated, the parties to such appeal are the appellant and the respondent, the parties to the case below, and the only parties thereto; but not the Magistrate or Crown. He cited *Taylor on Appeals*, 14; 20 & 21 Vict., c. 3, section 2, and also Ordinance 12 of 1879, sections 21 & 25.

Van Someren. This is a criminal matter and I appear as the Advocate for the Crown and the Magistrate. Section 36 of the Appeals Ordinance recognizes our right. Again independently of the Appeals Ordinance, it is a rule that without express terms, the Crown cannot be affected by a Statute. It cannot therefore be excluded from its right to appear in all criminal cases. This is a criminal appeal, the act does not in express words deprive the Crown of its right, and this right therefore remains. The Solicitor-General can appear for the Crown, or be represented by other Counsel.

Wood, J. The words of the Appeals Ordinance are explicit, and consistently therewith, I am of opinion the Crown, or the Magistrate, has no *locus standi* in an appeal from the decision of the Magistrate. The Ordinance recognizes the parties in the Court below, as the only parties to an appeal.

The case was then adjourned, and came on for final hearing on

WOOD, J.
1882.

PUNGHULU ALLANG
v.
HIM.

10th July. *Ross* appeared for the appellant. He having waived his objection to Mr. Van Someren's appearance for the Crown,

Van Someren appeared for the Crown.

No point worth reporting was however determined, and the conviction was eventually affirmed.

REGINA *v.* LEE HONG KANG & ORS.

SINGAPORE.

FORD, J.
1882.

October 11.

A Justice of the Peace is entitled under the Gaming Ordinance XIII. of 1879, to enter a house without a warrant, on receipt of information that a house is a common gaming house.

The fact that a Justice of the Peace so acts under section 10 of the Ordinance, and afterwards appears as prosecutor in the case, does not make the seizure bad, or the proceedings before the Magistrate, irregular.

This was an appeal in a Lottery case, in which the first four appellants, were convicted by Dr. N. B. Dennys, third Magistrate, for assisting in the business of a common gaming house, in contravention of sub-section 3 of section 2 of the Gaming House Ordinance No. XIII. of 1879, and two of the other appellants for being found in a common gaming house, the sentence inflicted on three of the appellants, being a fine of $1,500 each.

Donaldson [*Joaquim* with him] for the appellants contended, 1. That the presumption on which the Magistrate acted did not arise under section 11 of the Ordinance, and even if it did, there was no evidence that these men were assisting in the business of a common gaming house. 2. The papers found are not proved to be, and are not in law, instruments of gaming and as a branch of this, there was no evidence that what was called, in the case stated "*Wha Whey*," was an unlawful game. 3. The house was not lawfully entered. The last, he said, was his strongest point. Under section 8 of the Ordinance, before a house can be lawfully entered, there must be written information on oath and a warrant. Here there was no evidence of any written information on oath, and there was evidence of there being no warrant. Under section 10 of the Ordinance, sworn information would still be necessary; a Justice was not competent to issue a warrant until there was sworn information on oath; therefore the house was not lawfully entered, and therefore the presumption on which the Magistrate acted never arose. He then contended that the papers found, were not instruments of gaming and were not proved to be so, and cited *Watson* v. *Martin*, 34 L J. M. C. 50, where it was held that half-pennies were not instruments of gaming when used in the game of "pitch and toss," and concluded by urging that the fines were enormous, and were inflicted on the defendants, so that they might appeal against the decision as shewn in an affidavit filed by Mr. Joaquim.

Harwood [acting Attorney-General] in support of the conviction contended that there was sufficient evidence to shew that the papers were Lottery tickets, and consequently unlawful.

[*Ford*, J. You need not touch upon that point; I am with

FORD, J. 1882.

REG. v. LEE HONG KANG & ORS.

you there. The strongest point against you is, that the house was not lawfully entered.]

Harwood submitted that the house was lawfully entered under section 11. Mr. Stevens, the Assistant Superintendent of Police, and prosecutor, was a Justice of the Peace himself. By section 10 of the Ordinance "A Justice of the Peace may himself do what he "may under the 8th and 9th sections, authorize an officer of Police "to do, whenever such Justice is competent to issue a warrant "under such sections respectively, &c." Mr. Stevens, being a Justice of the Peace, took upon himself to do what he had power to authorize an officer of Police to do. Such being the case, it did not matter whether a warrant was issued or not. As regards Mr. Joaquim's affidavit, there must have been a misunderstanding between the Magistrate and the Counsel, as what he [Harwood] understood the Magistrate to have said was, that by inflicting a heavy fine, there might probably be an appeal, and he wished for an appeal.

Donaldson in reply contended that the evidence should have shewn Mr. Stevens was a Justice of the Peace, and he was both prosecutor and Justice of the Peace, which was illegal.

Cur. Adv. Vult.

October 63. *Ford*, J. This is a case on appeal from a conviction of four persons under the Gaming Ordinance of 1879, and the facts of the case as brought before the Magistrate, led him to presume under section 11, that the house in which the persons were found was a common gaming house, and on the evidence brought before him as to what these persons were doing, he found them guilty under sub-section 3 of section 2 of assisting in the management of a common gaming house, such a place being defined by section 1.

The question arises whether the conviction is good, and secondly whether the fines ought to be sustained. There is no doubt on the face of the proceedings, an absence of some technical details; but the objections on these grounds were not seriously pressed, and I think rightly so. Had they been pressed, the only result would have been that I should have sent the case back to the Magistrate, when these few technical details could have been supplied.

Several substantial objections were raised, and the facts of the case seem to have been these. The appellants were found in a house by the Police with a number of Lottery tickets in their midst on a bed, No. 1 having some of these in his hands; No. 2 was writing what was called a lime account, but which there is no doubt was connected with the lottery tickets, No. 3 counting on a Chinese board, and No. 4 doing nothing. These are the facts of the case, and upon these facts the Magistrate convicted the appellants as I stated before.

The first objection raised by the Counsel for the appellants was, that if this was a common gaming house, the presumption was rebutted by the circumstances under which the men were

arrested ; it was a carpenter's shop, and no usual adjuncts of gaming were found, such as a narrow door, &c. No actual lottery was proved to have been going on, and the men were only found with tickets in their hands. I am of opinion that these circumstances do not rebut the presumption, having regard to the well known way these Lotteries are carried on. As regards No. 2 appellant on this point, I must say that had his statement stood uncontradicted there would have been something in it ; but there is the direct evidence of the Police Officer that No. 2 was handling or writing on tickets.

The second objection raised was that the things found were not appliances or instruments within section 11, therefore the presumption was not raised. I am unable to take that view of the case. If these tickets were not appliances of a lottery, I fail to see what they were. They are the essential features of a lottery. The case of *Watson* v. *Martin*, 34 L. J. M. C. 50, cited by Mr. Donaldson as contradicting that view, does not do so ; the judgment there was exceedingly short, and gave no reason whatever for that view of the case. I have no doubt on this point that the Magistrate was right in holding these tickets as appliances of Lotteries.

The third objection raised impressed me a little at first, but on consideration I think it is of no weight. It was contended that the prosecutor, being a Justice of the Peace, ought not to be both the prosecutor and the person who acted under section 10, such a course of conduct rendering the seizure illegal. There would have been a great deal in this if the Justice of the Peace acted in a judicial capacity ; but it seems to me that he acted in an administrative capacity, and therefore the gist of that objection was completely taken away. I am, therefore, clearly of opinion the convictions ought to be sustained. An objection was also raised against the amount of the fines on the first three appellants, as being not only excessive, but fixed with a view to an appeal ; and with regard to the latter I do not think there is any conflict of evidence. The affidavit filed by the learned Counsel for the defence [Mr. Joaquim], would certainly imply that the Magistrate inflicted the heavy fines so as to have an appeal. An affidavit was subsequently filed by the Magistrate himself, and he does not contradict that which is contained in the affidavit of the learned Counsel, but says what words he used ; and these words certainly seem consistent with the view taken by Mr. Joaquim. The amount of the fines seems excessive apart from what has been stated in the affidavits. These fines, amounting to $4,500, on men who are not the heads of the lotteries, and in the position of the appellants, seem startling for a first offence. The highest fine allowed by the Ordinance is $3,000, and as a general principle, it is not usual to inflict the highest penalty on a first offence, and certainly not on a subordinate officer or agent. If the heads had been caught, the fines would have been more appropriate, although it is not possible to lay down a fixed rule on the subject. Taking all the circumstances into consideration, I think a fine of $250 each on Nos. 1 and 2 would

FORD, J. 1882.

REG. v. LEE HONG KANG & ORS.

meet the case, and I therefore reduce the fines to that amount. As regards Nos. 3 and 4, I alter the conviction to one under section 4 of the Ordinance, and order a fine of $50 in these cases.

REGINA *v.* TAN SIM HO.

PENANG.

SIDGREAVES, C. J. 1882.

NOV. 13.

No rules for the accommodation of Immigrants employed on Estates, having been prescribed under sections 36 & 39 of Ordinance 1 of 1876, no conviction for neglecting to provide such accommodation can be had.

The appellant had been convicted by Urban Bruce, Esq., acting Magistrate, for voluntarily or negligently omitting to provide proper and sufficient house accommodation for the Immigrants employed on his estate in Province Wellesley, and fined $150 under sections 36 and 39 of Ordinance 1 of 1876. It appeared from the evidence, that the accommodation given by appellant to the Immigrant coolies on his estate was very bad,—some witnesses thinking so from the tumbled down appearance of the building, and others from its being situate in an unhealthy spot. There was no evidence of any rules having been prescribed by His Excellency the Governor for such accommodation, and the fact was, no such rules had ever been prescribed. The appellant appealed.

Van Someren for the appellant opened the case, and after reading the case as stated by the Magistrate, and the sections of the Ordinance, was stopped by the Court, who called on

D. *Logan*, [*Solicitor-General*] for the respondent, to support the conviction. He admitted he was unable to do so.

Sidgreaves, C. J. held, in the absence of the rules, no conviction could be had, and quashed the conviction, and ordered the fine to be remitted.

Conviction quashed.

PAWNBROKER *v.* RAMSAWMY PADIACHEE.

PENANG.

SIDGREAVES, C. J. 1882.

NOV. 13.

A single act of taking a pledge or pawn, does not make a person punishable under section 5 of the Pawnbroker's Ordinance 7 of 1872, for "carrying on the trade of a pawnbroker."

The respondent had been charged before the first Magistrate of Penang, C. W. S. Kynnersley, Esq., with carrying on the trade of a pawnbroker, under section 5 of the Pawnbroker's Ordinance 7 of 1872, without a license. The evidence was, that he had taken in pledge certain gold ornaments, carts and bullocks, to secure $100 advanced by him to one Samy Vandian, together with interest at 36 per cent. There was no evidence of his having any time before, or since, taken any other thing on pledge. His Counsel submitted to the Magistrate, that there was no evidence

in support of the charge, as a single act of taking a pledge, did not make it the carrying on of a "trade." The Magistrate so held, and dismissed the charge. The pawnbroker now appealed.

Thomas for appellant. A pawnbroker is defined in section 2 of the Ordinance, as one who, in consideration of a loan, takes a pledge or pawn of any article. The respondent took a pledge, and therefore was a pawnbroker within the Ordinance,—and if so, what he did to make him such, was a carrying on the trade of a pawnbroker.

Van Someren for respondent. The offence is carrying on of the trade of pawnbroking—this must mean the habitual taking of pawns, and section 5 must be taken to refer to section 3. A single act is not sufficient. *Rex* v. *Little*, 1 Burr. 610, it was held that the single act of selling a handkerchief, was not the carrying on of the trade of Pedlar without a license, within the Pedlar's Act.

Thomas replied.

Cur. Adv. Vult.

November 20. *Sidgreaves*, C. J. This was an appeal from the decision of the First Magistrate of Penang, dismissing a charge against one Ramsawmy Padiachee, of carrying on the trade of a pawnbroker, without a license, contrary to the provision of section 5 of Ordinance 7 of 1872. Evidence was given, that to secure a loan of $100, the defendant had, in addition to a Promissory note, taken a mortgage of bullocks and carts, and jewelry, the interest on the loan being $3 a month, for three months.

The Magistrate considered that this one act did not constitute the carrying on the trade of a pawnbroker. The 3rd section of the Ordinance enacts that "No shop or place shall be "opened or kept for carrying on the trade of Pawnbroker, with-"out the permission of the Farmer of Pawnshops of the Settle-"ment, place, or district, within which the same is situated, nor "without a license from the Licensing Officer, to be appointed by "the Governor, under this Ordinance."

No penalty is attached to an infringement of the provisions of this section; but by section 5, "No person shall carry on the trade of Pawnbroker without a license as required by this Ordinance, or contrary to the terms of such license," under a penalty of $250 [section 22]. The carrying on of the trade under section 5, would seem therefore to be more or less defined by section 3, and the object aimed at was, to prevent the opening of shops and places for carrying on the trade of a pawnbroker, without the permission of the Farmer of Pawnshops, and without a license.

I do not consider that a man who acts as the respondent in this case acted, can be said to have been carrying on the trade of a pawnbroker; although if it could be inferred from the number of such acts of pawnbroking, or from the circumstances under which he was acting, that he was actually carrying on the trade of a pawnbroker, although not in any defined shop or place, I think a conviction against him might be maintained. The decision of the

SIDGREAVES, C. J. FORD & WOOD, J. J. 1882.

PAWNBROKER v. RAMSAWMY PADIACHEE.

Magistrate must be affirmed.

On the application of the pawnbroker, *Sidgreaves*, C. J., subsequently reserved the point for the consideration of the Court of Appeal, under section 38 of the Appeals Ordinance 12 of 1879.

31st March, 1883. The case now came on before the full Court of Appeal, consisting of *Sidgreaves*, C. J., *Ford & Wood*, J. J.

Thomas for appellant. Section 2 makes the respondent a Pawnbroker by taking the pledge, and if the mere act made him a pawnbroker, the doing of it was also the carrying on the trade of a pawnbroker. The Legislature clearly so considered it, as they make an exception, which shews that they considered section 2 to apply to every case. The exception does not apply to this case. The section and exception speak of single acts. To hold section 5 to refer to section 3, would be to provide a way of escape for persons taking pledges, by doing so, but not in a definite shop, or place of business.

Van Someren for respondent. Section 2 merely defines what a pawnbroker is, in order to shew what is the trade the Act is intended to put down. It must be read simply as a help to sections 3 and 5. It constitutes the status of pawnbroker, but no more. To hold it to be more, would be to make section 3 meaningless, as, if a single act is a breach, *a fortiori* the continuous doing of it in a shop or place of business. A "pawnbroker" is defined, but not what the "carrying on the trade" of a pawnbroker is. A glance at the previous Ordinances, would shew that the Legislature could never have intended a single act to be an offence. In the Pawnbroker's Ordinance 7 of 1872, we have the word "business" of a pawnbroker—but in the still earlier Ordinance, 25 of 1870, section 4, we have it expressly provided that the taking of a single pledge is an offence. This Ordinance was disallowed by Her Majesty. The Ordinance of 1871, was passed in its place, which aimed at the "business" of a pawnbroker, and the following year, a further alteration is made, by the word "trade" being used for "business," as if to put the matter beyond doubt as to what was aimed at. Even if it were otherwise, if the Legislature had not used words to take in the evil intended, the Court cannot stretch the words they have used, so as to take it in, simply because they did intend it, though they omitted to say so. *Proctor* v. *Mainwaring*, 3 B. & Ald. 145. The Ordinance makes the carrying on the "trade" the offence, and a single act is not the carrying on of a trade. *Rex* v. *Little*, 1 Burr. 610, is in point.

Thomas replied.

Wood, J. I have been desired by my learned brothers to deliver the judgment of the Court. We are of opinion that the judgment of the Court below was correct. This Ordinance, it must be remembered, was to establish a monopoly, and must therefore be construed strictly. A person offends against section 5 if he carries on the trade of a pawnbroker. "Pawnbroker" is defined, but the "carrying on the trade of pawnbroker" is not. In analogy to what is "trade" and a "trader," within the Bankruptcy Laws, we think the trade of a pawnbroker is, if not the habitual carrying

on of acts of pawnbroking, it is at least the carrying on the act with the intention of making a means of living by it. This is the common and accepted meaning of the words "carrying on the trade," and we are of opinion it is so, within the meaning of this Ordinance.

SIDGREAVES, C. J. FORD & WOOD, J.J. 1882.

PAWNBROKER v. RAMSAWMY PADIACHEE.

Sidgreaves, C. J. and *Ford*, J. concurred, the latter observing that if there had been room for doubt on the point, the course of the Legislature in changing a single act which was made an offence under the Ordinance of 1870, into "the carrying on the trade" under the Ordinance of 1872, was conclusive to dispel it.

Judgment affirmed.

CARTAN *v.* MEENACHEE.

PENANG.

SIDGREAVES, C. J. 1882.

NOV. 13.

A conviction for two offences, and awarding one punishment, is bad. The objection is not a formal one, and is not aided by sections 32 & 33 of the Appeals Ordinance 12 of 1879.

The appellant Cartan had been convicted by Urban Bruce, Esq., acting Magistrate, in a first count for voluntarily causing hurt, and in a second count, with committing theft, and was sentenced to two months' rigorous imprisonment. The evidence was, that the appellant and others had assaulted the respondent, and in the assault he pulled one of the respondent's earrings off, and in so doing tore his ear.

Van Someren for the appellant contended, that the evidence, if reliable, shewed the appellant had committed robbery—but the Magistrate had no jurisdiction over such an offence—to give himself jurisdiction he had split it up into two counts, each being within his jurisdiction—but in trying to avoid one evil, he had fallen into another, for he awarded one punishment for the two offences, which rendered the conviction bad. *Maxwell on Magistrates*, 31, 32; *Newman* v. *Bendyshe*, 10 A. & E. 11.

D. *Logan* [*Solicitor-General*] contended that the defect pointed out was merely one of form, and could be amended under sections 32 and 33 of the Appeals Ordinance 12 of 1879.

Sidgreaves, C. J., after remarking that the Solicitor-General was quite right in relying on sections 32 and 33, pointed out that in *Newman* v. *Bendyshe*, so far back as 1839, it was contended that the objection was matter of form, and so was aided by sections 25 and 27 of the Statute 1 Wm. IV., c. 64, nevertheless the Court considered the objection fatal. He considered that that case was an authority, that this was not matter of form, but substance, and accordingly quashed the conviction, on the ground that it expressed one penalty for two offences.

Conviction quashed.

HASS *v.* CHOO CHYE HOK.

PENANG.
WOOD, J.
1882.
Dec. 11.

A Magistrate has no jurisdiction to try a foreigner for an assault on the high seas on board a foreign ship. The words "any person" and "wheresoever committed," in the Statute 12 & 13 Vict., c. 96, s. 1, though general in its terms, apply only to offences committed by British subjects, or on board British ships. The Statute merely confers on the Criminal Courts of Common law, the jurisdiction formerly possessed by the Admiralty, but no more: the jurisdiction of the Admiralty was limited as above.

The appellant Hass, was Chief officer on board the German steamship *Picciola*. The *Picciola* was under charter to a chinese firm in Penang, composed of British subjects. The respondent was supercargo on board the steamship, in the service of the charter.

It appeared that while the *Picciola* was on the high seas, on her way to Rangoon from Singapore, the appellant assaulted, beat, and kicked the respondent. The vessel from Rangoon came back to Penang where the respondent laid an information and procured the arrest of the appellant. The appellant was tried by C. W. S. Kynnersley, Esq., Magistrate, for assault, under section 352 of the Penal Code, and was convicted and fined $10. He now appealed. At the hearing before the Magistrate, the German Consul attended, but no objection was taken by any person to the Magistrate's jurisdiction. The appellant was a German subject, and the steamship sailed under the German flag. The respondent was a Chinese subject.

Clutton for appellant. The point is one of jurisdiction only. The Magistrate has no jurisdiction over anything done in a foreign ship on the high seas. There is no evidence of the nationality of the ship in the case. The conviction states that the ship was a German ship and on the high seas—hence it would appear that the prisoner was convicted wrongly. No question was raised as to jurisdiction before the Magistrate. The respondent may rely on Ordinance 1 of 1873, but the preamble shews the limited character of the jurisdiction, and the consent of the Foreign Consul is requisite.

[*Wood*, J. It is admitted that the Consul not having assented, that section does not give jurisdiction.]

This is the only Act which can give jurisdiction, but on reference to this Ordinance, it appears clearly that it does not apply. The Ordinance gives this jurisdiction only in certain cases, *viz.*, against the discipline of the ship, but prosecutions by the master or owner of the ship. That is not our case. The Magistrate by Common law has no jurisdiction over offences committed on the high seas. The Statute 12 & 13 Vict., c. 96, s. 1, will be mainly relied on. That section says, "If any person, &c." In this case "any person" means a *British subject*. This cannot apply to a foreign ship or a foreign subject. *Maxwell on Magistrates*, 90; *Maxwell on Statutes*, 119; *Regina* v. *Lewis*, 26 L. J. M. C. 104; *Regina* v. *Bjosson*, 34 L. J. M. C. 180. The words used in 12 & 13 Vict., c. 96, s. 1, "*treason*" in particular, seems to shew that the words are directed to British subjects, for it can hardly be supposed that British Courts would try a foreigner for

treason against a foreign power. *Regina* v. *Edwards*, 1 East 278. The jurisdiction must be stated in the conviction. *Paley on Convictions*, 192, citing *re* Peerless, 1 Q. B. 143. It would have to be stated in the conviction that the man was a British subject, if this fact is necessary to the conviction. *Re* Peerless, supra. The words of the Statute 12 & 13 Vict., although general, must be confined within reasonable circuits, *viz.*, as to subjects abroad, or British ships.

Ross [*Van Someren* with him] for the respondent. We contend that under the Statute 12 & 13 Vict., c. 96, s. 1, there is jurisdiction, but supposing the man is a foreigner, and there was no jurisdiction, then it was the duty of the representative of the foreigner to have taken the objection. The Statute is applicable to "any person," and to all offences "wheresoever committed." The Statute was intended to extend the jurisdiction of Criminal Courts, and should be construed liberally, especially as the words are general and large enough to take in any case. The Act is also applicable by its terms to all Colonies. Under this Statute, piracy is tried in this Court.

[*Wood*, J. Looking at the title of the preamble of the Act, in which reference is made to the jurisdiction of the Admiralty, I am of opinion that that jurisdiction must be looked at in construing the application of this Act, and that it could not be satisfactorily contended that the Act would apply to those persons and those places over which the Admiralty had no criminal jurisdiction, and that in consequence the language of the Act would not be held to apply to foreign ships. *Regina* v. *Lewis*, I think, supplies a *ratio decidendi*.]

The jurisdiction of the Admiralty probably is more limited, and has been the subject of much discussion and difference of opinion at home. *Regina* v. *Anderson*, 1 L. R. C. C. R. 161; *Regina* v. *Keyn*, 2 L. R. Ex. Div. 63.

[*Wood*, J. I consider the Statute applies to British ships and British subjects only.]

If there is no jurisdiction on the face of these proceedings, the case should be remitted back, to shew where the offence was committed; it is believed it was opposite Klang in Selangor, where the Court has jurisdiction under the Statute 41 & 42 Vict., c. 73. [They did not further press this last point.]

Wood, J. There is no jurisdiction on the face of these proceedings, and it is doubtful if any jurisdiction can be shewn by further evidence. The latter point is not further pressed by Mr. Ross, so the conviction will be quashed with costs.

Conviction quashed with costs.

REGINA *v.* TAN POH KEAH.

SINGAPORE.
FORD, J.
1883.
January 5.

The mere fact of a person advancing money to the owner of an estate in order to enable him to work his estate, and taking a mortgage of the estate as security, does not make him liable to punishment as an abettor of mischief, by reason of the owner having encroached on Crown lands, and cut down timber. Nor does the fact that he is indirectly benefited by getting his wood free, make him so liable.

This was an appeal from a conviction by A. W. V. Cousins, Esq., Magistrate. The facts appear sufficiently in the judgment.

Baumgarten for the appellant.

Harwood [*acting Attorney-General*] for respondent.

Cur. Adv. Vult.

January 11. *Ford*, J. In this case the appellant was charged by the authorities of the Land Department with the offence of mischief, and found guilty by the Magistrate of abetment of that offence. The proceedings were taken under sections 425 and 107 of the Penal Code, and the appellant was sentenced to $50 fine, or in default to one month's imprisonment.

The circumstances of the case, gathered from the evidence and concisely put, are as follows.

One Teo Choon Seng is the owner either in fee or for a term of years of a piece of land in the district of West Seletar, and, as is very generally the case with his class, not having sufficient capital to cultivate the land after its purchase some eight or ten years ago, obtained advances from the appellant for so doing, under a condition to sell the produce or the greater part of it to him, depositing also his title deeds as security for such advances. The advances are rarely paid off until the close of the cultivation, and in this case, they have continued to be made by the appellant from time to time, and accounts are kept between him and his equitable mortgagor of such advances and of the gambier and other produce respectively bought and sold between them. No direct supervision of the estate is exercised by the appellant, although he goes to look at the estate occasionally. When the offence complained of was committed, six months had elapsed since he had done so.

The wages of the men are paid by the landowner, although naturally often out of the advances made to him by the appellant, and he controls and directs their labor and the cultivation generally.

Encroachments on the land contiguous to the estate have been made by Teo Choon Seng and his men for the purpose of cutting wood for preparing the gambier for market; and somewhere early in November some 15 large trees were cut down, either by Choon Seng or under his orders and with his acquiescence. I think I may take this to be so, although the evidence is not very clear. Two of the trees, however, have been admittedly sold by him to one Ah Suan. There is no evidence of any kind to connect the appellant with this offence as a principal, or any to show that he at any time gave any orders for cutting the timber in question, or

knew that it had been so cut. The Magistrate, however, was of opinion that although not guilty of mischief, he was guilty of abetting it, such abetment to be inferred, as I understand the Magistrate's decision, from the appellant's general position with regard to the estate and from his cognizance of and consent to the acts complained of. There is, as I have said, not one tittle of direct evidence to sustain the charge that he was cognisant of or consented to the offence committed, and I assume, therefore, that this cognisance and consent is to be inferred from his general position with regard to the estate. I am quite unable, however, to overlook the position of Teo Choon Seng as the real owner of the property, or to infer the knowledge and cognisance of the appellant from the mere circumstance of his position, or to infer that guiltiness of mind which is an essential element in liability to a criminal prosecution, in all but a very few cases. An examination of the Section of the Penal Code defining the offence of abetment is sufficient to put the question beyond a doubt, for to constitute the criminal abetment of an act, a person must [1] "Instigate any person to do that thing," or [2] "Conspire with any other person to do that thing," or [3] "Intentionally aid by an act or illegal omission the doing of that thing." In this case Choon Seng and his men have done the mischief. So much may be said to have been found by the Magistrate's decision acquitting the appellant as a principal. There is no evidence that Choon Seng or his men did so at the instigation of, or by combining with the appellant; and equally none that the appellant by any act or illegal omission aided the offence, unless I were to hold that it was the duty of an equitable mortgagee of lands, with an agreement to secure the application of its cultivation to the repayment of continuing advances, to be continually running over the estate in order to avoid a criminal prosecution for possible criminal acts of the owner and cultivator, which by so doing he might prevent.

I am at a loss to conceive any principle known to the law which would impose such a duty on the appellant; and there being no such duty, there can be no illegal omission of it, and far less the illegal omission which seems required by the Penal Code. It may have been, as the Magistrate further suggested, much advantage to the appellant that the owner should get his wood free; but I need hardly say that the indirectly receiving a benefit by the criminal act of another, does not render the receiver personally responsible as principal or abettor of those acts. The wrong person has clearly been proceeded against in this instance. A common sense test of this question would be found in answering the question, Whether the appellant would have been liable for this trespass had it been committed during his absence in China, from which country I understand he returned some 12 months ago? His interests in and position towards the estate and its owner would, when in China, have been precisely the same as at this moment.

The erroneousness of an answer which would consign him to 3 months' imprisonment on his return, is too manifest for explication.

Conviction quashed.

LOW CHU *v.* OPIUM FARMER.

PENANG.
WOOD, J.
1883.
February 19.

The appellant having obtained a permit for conveying two chests of opium by certain specified boats to Kulim, in the Malayan territory, proceeded with the chests in such boats up to the mouth of the Kulim river. On arrival at the Kulim river, he found there was not sufficient water to permit of these boats going up it: he accordingly engaged smaller boats, but these were too small to take in a single whole chest. The appellant accordingly, with the view of carrying on the transit of the opium to Kulim, in these latter boats, and without any fraudulent motive, broke bulk, placed the 80 balls of each chest into a gunny bag, and put them in the two smaller boats,

Held, he had committed an offence under section 5 of the Excise Ordinance 4 of 1870, as amended by section 1 of Ordinance 6 of 1879.

The forfeiture of illicit or contraband articles, on conviction of the offender, is imperative on Magistrates.

The appellant was convicted by J. K. Birch, Esq., Magistrate of Province Wellesley, for removing a certain quantity of opium for exportation, to wit, 2 chests containing 80 balls, contrary to the provisions of the permit furnished by the Import and Export Office, in contravention of Clause II., section 1 of Ordinance 6 of 1879, and was fined $25. The opium was also declared to be forfeited. The evidence shewed that the appellant had received two permits from the Export Officer for exportation of two chests of opium bearing certain numbers, to Kulim, by certain tongkangs or boats, specifying their numbers also. The permit was in form of Schedule E of the Excise Ordinance 4 of 1870, except that the words "who is required to export same in terms with this permit" were crossed out. The appellant conveyed the opium in the chests, by the specified two boats, as far as Mangkwang Haji Omar at the border of Province Wellesley. On arrival there, finding there was not sufficient water in the river for the two tongkangs, he engaged Malay boats which were smaller in size, but too small to carry a whole chest. For the purpose of transit in these boats, and without any fraudulent motive, but with the object of carrying out his original intention of taking the opium to Kulim, the appellant broke the chests, and put the 80 balls of each chest, each lot into a bag, and placed them in the Malay boats, ready to start up river to Kulim: before he started, certain Revenue Officers came down on him, and he and the opium were all taken into custody. It appeared that the Kulim river rose and fell continually, and was a good deal dependent on the weather for sufficient water to admit large boats to go up.

F. H. *Gottlieb* [*Van Someren* with him] for appellant. The permits having been obtained for the removal of 2 chests of opium in the forms given by the Ordinance, and bulk broken, and the opium put into bags, and in process of exportation in that form,—the question is, whether the defendant was rightly convicted. The bales being in that form, was without intention to defraud. The conviction is under clause 2, that we exported contrary to the terms of the permit. We are to export, but not necessarily to export in the terms of the permit. Though section 6 of the Excise Ordinance 4 of 1870, as amended by the Ordinance of 1879, requires that the number of chests, and marks of the cases are to be mentioned in the bill of particulars, yet in Schedule E—[the

permit]—alone, it goes on to say "who is required to export in terms of this permit;" but these words are struck out in the two permits in this case. The permit in Schedule E is under sections 4, 6, 10 & 24 as stated in the heading, it should be 5, 6, 10 & 24. Schedule E was meant to apply one form to the Act for the issuing of permits. Section 5 does not require the permit to state that the goods are to be removed in terms of the permit. Section 6 does require certain particulars, but not the words "in terms of the permit." The words being struck out requiring "to export in terms of this permit," we are not to regard the terms of the permit. These words are rightly struck out, for they do not apply, as may be seen by reading section 6 which specifies what are to be the "contents of permits." Section 10 gives the words "in terms of permit," so it may be inferred that the terms "in terms of the permit," in the permit Schedule E, is referable to sections 6 & 10 only. Section 24 refers to spirits, and in this it is to be remarked that the words "in terms of the permit" would be inapplicable and in excess, and in contradiction of the terms of the section. The appellant therefore committed no offence in merely conveying the balls in bags, and not in chests.

Thomas for respondent. This is a conviction under the new Ordinance, section 1, which is substituted for section 5 of the old Ordinance, the reason for the substitution must be identification—and means of identification accordingly are required. There can be no other reason. The appellant's act is real grievance—the moving would be a second moving after bulk is broken, and ought, in the interests of the Opium Farmer, to be protected by another permit. It must be intended that this was the intention of the framers of this Ordinance. The permit, if looked at, must be followed. It requires the two chests to be exported by tongkangs to Kulim, and the act of the appellant was an offence within the Excise Ordinance as, 1st a breach by not exporting by tongkangs to Kulim—as he did not export to Kulim 2 chests, but what he exported were chests, and balls in bags, a portion of the way; and 2ndly his conveying in bags was a second moving, and a new permit was required, when he found that he could no longer move under the first permit—the words "to export in terms of the permit" are mere surplusage. He has incurred the penalty because he has offended against the provisions of the section, and not merely acted contrary to the terms of the permit he held. He acted contrary to the section, when, being at Mangkwang Haji Omar, he changed the form of the bales—for the moving intended is from here to Kulim in a particular form—he instead thereof, breaks the journey, and the bill of particulars he has given required to be renewed. Before moving the goods under new conditions, he must give a fresh bill of particulars, and obtain a new permit for the information of the Opium Farmer. This he did not do, and so it is a breach of the section as well as of the permit. The permit must be followed as given in Schedule E, and if not followed, there is a breach of the section.

Van Someren in reply. There is no breach of the permit.

WOOD, J. 1883.

LOW CHU v. OPIUM FARMER.

The officer had no business to state the tongkangs by which the vessel was to go, or the number of the chest, as the section does not require it—his doing so does not oblige us to transport by that boat only. These conditions imported into the permit are superrogatory; and more so, in view of the words, to be exported "in terms of the permit." Lastly there is, if a breach of the permit, no breach of the section, as it was not a new removal but all one act of transferring. There is no breach of the section when one compares sections 5 & 6 of the Ordinance 4 of 1870, together.

Wood, J. I am of opinion that the object of the provisions of section 1 of the Ordinance 1 of 1879, in substitution for section 5 of 1870, must have been the identification of the chests of opium, with a view to the protection of the interests of the Opium Farmer. The Schedule E is properly to be held to be part of the provisions of the section, and its terms should be held to be embodied in it. The permit does in terms, and rightly so, name the ship, the particular form of the packages of the opium, and the voyage as a whole; and I am of opinion that in changing the form of his packages and the terminus of his several voyages, the appellant has offended against the provision of the section, within the meaning of the Ordinance.

I accordingly affirm the decision of the Magistrate. I do not consider the amount of fine unreasonable, and I hold the forfeiture of the opium to be imperative, not as a punishment, but as a protection of the Opium Farmer. I should have no hesitation however in recommending a return of the forfeited opium by His Excellency the Governor, on the ground that the section has now for the first time come before the Courts,—that the appellant's act resulted from a not unreasonable mistake of the law,—and no fraud is imputed to him [*a*]. I shall make no order for costs.

Conviction affirmed; no order for costs.

REGINA *v.* KWEH TE HIN.

SINGAPORE.

SIDGREAVES, C. J. 1883.

March 22.

Except there is a dispute as to the proper position of landmarks, and the matter is reported to the Collector, there is no power in the Collector of Land Revenue to order a survey of any land with a view to putting up or repairing landmarks under Ordinance 7 of 1882; and the owner of such land cannot be ordered to pay the expenses of such survey.

The fact that the land is overgrown, and there are no proper landmarks marked out, although necessitating a survey, does not render the owner of such land liable to pay the expenses of the survey, where the Collector has proceeded merely after notice, under Section 6 of the Ordinance.

A Magistrate [on the prosecution by the Collector of Land Revenue] having, under such circumstances, ordered the defendant, the owner, to pay the expenses of such survey, on appeal, such order was quashed and costs awarded against the Collector.

This was an appeal from the decision of H. A. O'Brien, Esq.,

[*a*] The opium was afterwards restored by order of His Excellency the Governor, under section 85 of the Excise Ordinance.—J. W. N. K.

Magistrate of Malacca. The facts giving rise to it, and nature of the question raised, fully appear in the judgment.

Drew for the appellant.

Harwood [acting Attorney-General] for the respondent.

Sidgreaves, C. J. This was an appeal from an order for payment made by the Magistrate of Malacca under section 13 of Ordinance No. 7 of 1882, whereby the appellant had been adjudged to pay to the Collector of Land Revenue at Malacca, the sum of $79.90, the cost incurred by the Collector of Land Revenue in setting up landmarks to serve as boundaries of land comprised in Government Leases Nos. 4146 and 4147. By section 2 of the above Ordinance. :

"Whenever it is found that landmarks are not set up on any land under the Crown, whether by Lease or grant, or that the landmarks, if set up, have become out of repair or are not plainly distinguishable, it shall be lawful for the Collector of Land Revenue to require, by notices, good and solid landmarks to be set up at such places as the Collector may direct, or if already set up, the Collector may require them to be repaired."

By the third section. :

"Notice in writing of every requisition to set up or to repair landmarks under this Ordinance shall be served, in the manner prescribed in section 16, on the owner or occupier of every lot of land as to which the landmarks are to serve as boundaries, requiring him to set up, or to repair, the landmarks within such time, not less than fifteen days, as the Collector may think reasonable."

No such notice appears to have been given by the Collector of Land Revenue, but Reginald Rozario, a Forest-ranger in the Land Office, gave the appellant notice on the 4th August, 1882, to put up landmarks on the land comprised in leases Nos. 4146, 4147, and giving him fifteen days' time to do it in. As the appellant took no notice of it, the Government put boundary stones on his land and sent him a notice demanding $145.90 as the cost of surveying and putting up boundary stones on his land. The appellant declined to pay, saying he could not stand such a heavy expense, and accordingly a summons was taken out against him under section 13. The cost of the resurvey was $125.90 and the result of it was to prove that a previous survey made at the instance of the appellant five years ago and for which he paid $66, was correct.

The appellant does not dispute his liability to pay for the putting up of the boundary stones, which, with $4 for transport amounted to $20, but disputes his liability to pay for the resurvey. Assuming the notice given by Mr. Rozario to be a valid one under section 2, the next step is prescribed by section 6, which is as follows:

"After service of notice to set up, or repair landmarks, if the landmarks are not set up or repaired within the time stated in the notice, or in the event of any dispute between the parties interested as to the setting up, or repairing such land marks, it shall be lawful for the Collector to cause such landmarks to be set up or repaired, and the expense incurred thereby shall be chargeable and recoverable as hereinafter provided."

This section therefore authorizes the Collector to set up or

SIDGREAVES, C. J. 1883.

REG. v. KWEH TE HIN.

repair landmarks, and provides for the recovering of the expenses incurred in the setting up or repairing such landmarks.

It gives no authority whatever to the Collector to incur and charge the parties served with such notice with the expense of a resurvey. That the owner or occupier is not to be saddled with the heavy expense of a resurvey on mere non-compliance with the terms of the notice required by section 2, appears very clearly from the provisions of section 10.

"If any dispute shall arise as to the position in which any landmark should be placed, the same shall be forthwith reported to the Collector of Land Revenue, who, if unable to settle the dispute, shall direct the lots to be re-surveyed by a surveying officer at the Settlement under the Surveyor-General, and the landmarks shall be set up in the position shewn by such survey to be the correct position. The expense of any such survey shall be borne by the parties interested in such landmarks, and shall be recoverable as provided by section 13."

There being no reference whatever in the case to any such dispute having arisen, or to any such dispute being reported to the Collector of Land Revenue, there can be no justification under that section at all events for incurring and charging the appellant with the costs of a resurvey, and there are no other provisions in the Ordinance which could justify such a demand upon the appellant.

It does not appear that the appellant was ever asked to point out the boundaries of his land, and it was stated in argument by his Counsel that he never was. The reason assigned for making the resurvey was given by Mr. Rozario in his cross-examination by the then defendant, the present appellant.

"Yes, this receipt is for fees for the survey of the land comprised in these two leases. You are charged with these expenses because you had not proper boundaries marked out, and some of the land was overgrown, which rendered a resurvey necessary."

The Ordinance not only does not sanction this summary mode of dealing with the interests of the owners and occupiers of the land, but is expressly framed to protect them from it. The order of the Magistrate must be altered by reducing the amount of the judgment to the amount expended for the setting up the land-marks, his liability for which has never been disputed by the appellant. The Magistrate evidently considered that the appellant had been hardly used, for he deducted from the cost of the resurvey, charged, the cost incurred by the appellant on the previous one made by him five years ago; but upon what principle, if he considered that the appellant was liable at all, I have been unable to ascertain.

Costs against the respondent, the Collector of Land Revenue.

BOEY AH SAM *v.* SEOW AH SEONG.

A pawnbroker who permits large numbers and grades of his employés to have access to articles of value pledged with him, beyond what a man of ordinary prudence would do, when such goods had been deposited with him, is guilty of negligence and liable to make compensation if such goods are lost without explanation.

SINGAPORE.
FORD, J.
1883.

Sept. 10.

This was an appeal from an order made by R. S. O'Connor, Esq., Senior Magistrate of Singapore.

Cur. Adv. Vult.

26th September. *Ford*, J. This is an appeal from a decision of the Senior Magistrate of Singapore, who awarded certain compensation to the respondent in respect of certain articles of jewellery pledged by him with the appellant and alleged to have been lost or embezzled or to have become of less value through his default and negligence. The case has been two or three times before the Court on minor issues raised during the proceedings before the Magistrate, to which however, there is no need to refer.

The circumstances of the case as they are now before the Court for adjudication are as follows; and there is no conflict of evidence upon them:—

On the 25th September last year, the respondent pledged with the appellant, a licensed pawnbroker, certain articles of jewellery, receiving an advance of $45 thereon, with the usual pledge ticket. A few days previous to the 19th December, he returned to the appellant's shop with the ticket, the amount advanced, and interest, and tendered the sum due in order to redeem his pledge. The property pledged could not be found, and the respondent was told to call again. In two or three days he returned accompanied by his legal adviser or his clerk, when the respondent produced certain property in a paper or bundle bearing the same number as the pawner's ticket but containing other property than that of the pawner. The original property the appellant could not then, and has not up to this date been able to produce, and from proceedings he admits to have taken in the police, although unsuccessfully, his opinion evidently was, that one of his clerks entrusted with taking in pledges had embezzled these and other goods, substituting worthless ones for them. There is, however, no other evidence of how the goods were taken, before the Court; but there is the admitted fact that, for the business hours of the day, the appellant's three clerks and some nine other persons, of what exact grade of assistants does not appear, but apparently coolies or servants of a lower grade who assisted to look after property pledged and to take pledges in, have access to the place where the drawers are, in which pledged jewellery, &c., are placed. These drawers are in rows of six, seven, or eight, forming two large bureaus which are carefully secured by a large iron bar and padlocks at the closing of the business of the day, continuing so all night and until the shop is opened the next morning. I understand this to be the effect of the evidence, although in his first examination the appellant gave a somewhat

FORD, J. 1883.

BOEY AH SAM v. SEOW AH SEONG.

different account. The material point, however, is that the goods are secured under bars and locks during the night. There is evidence that this is the customary way in which pawnbrokers keep such articles in other pawnshops, although in some, it seems, the extra precaution of examining pledges at the end of each day is taken, rather, however, for the purpose of seeing that they are to the value of the sums advanced upon them, than for fear of loss. Some twenty to forty pledges of this class, according to the appellant's evidence, would be taken *per diem*—probably 25 would not be far from a correct average—but as a very great proportion are also said never to be redeemed, it is but a percentage of that number which are given back during the same period. There is no evidence as to what this percentage is, but did it amount to the full number stated, the circumstance would not vary the view I take of this case.

There is no question but that under the provision of section 11, Ordinance 7 of 1872, the appellant is liable for default or neglect for goods embezzled or lost, evidence of which is not forthcoming in this case. The degree of negligence for which the appellant is liable is not either in dispute. It is properly described as not taking such care of the pawned articles as an ordinarily prudent man would take of his property of a like description.

Several cases have been cited, none quite similar or analogous to the present, but all affirmatory of this principle, and one case has been cited very relevant as at least shewing that the Courts should not go beyond it, determining at least that a gratuitous depository is not bound to multiply precautions beyond this standard; and the English law does not require in general any higher degree of care in the pawnee of personal chattels. The question of what amounts to negligence is not always easy of determination, but to my judgment the clearest possible *primâ facie* case is made out against a person who allows access to articles of this class to such a number of an undescribed set of persons who, during the whole of the day, had access to these drawers, unlocked and unsecured and free from any restraint. From a common sense point of view, it would appear to me as clear as anything can be, that an ordinarily prudent man would have confined access to such property strictly to himself or so many persons, if practicable, of his most confidential employés, as were necessary for lodging in these drawers and taking from them the pledges of the day. He would certainly have secured them from the obvious opportunities of pilfering, or stealing, or what not, by locks and keys, doors or other appliances which would secure to himself and his more confidential servants alone access to them. Surely *primâ facie*, no ordinarily prudent man would allow his valuables to run such a risk as they must have done in this case. To this it is replied that the exigencies of the pawnbroking business require this insecurity, the inconvenience of locking and unlocking drawers or removing sufficient safeguards against loss or theft being too great for the ordinary course of business to go on. I am quite at a loss to understand this argument as applying to deposits varying in number from twenty to forty

only a day, probably, as I have said, of an average not exceeding 25. So many turnings of a key or fastenings of a secure padlock or closing of doors do not seem to me to involve any but a slight amount of labour, and one that could well be undergone without any practical inconvenience to the business. This argument might have a more rational application were the question one having reference to the whole business of the shop, which comprises some 200 to 300 deposits during the day, and these, articles of small value such as form the bulk of a pawnbroker's stock. But as applicable to a few valuable deposits I fail to see its validity, and moreover there is some evidence to shew that in respect of his money the appellant exercises a much greater care, keeping this in his strong box and giving out only a few hundred dollars at a time to be kept in these open drawers and then advanced by himself or his assistant clerks. I think there is sufficient relation in point of value between money and the articles popularly comprised in the term jewellery—that is gold and silver ornaments and precious stones—to say that an ordinarily prudent man would bestow the same care in ensuring the safe custody of each class of property. It is only in small quantities, and for immediate use that he places his money where he keeps the jewellery open the whole day.

It is said again that this is the customary way of managing those pawnshops in Singapore. But on the hypothesis that it is so, unless the custom is in harmony with the principle governing the amount of care required, I do not see its value. If the whole of the pawnbrokers of Singapore are customarily negligent, necessarily the custom is a bad one; but I know of no custom proved which allows a dozen persons of all grades access to deposits of value, although it may be that generally the places of deposit are not locked up during the day. Compare this case with the facts in *Giblin* v. *McMullen*, 2 L. R. P. C. 317, before referred to, and let us ask what the Court would have said, had in that case all the employés of the defendant's bank had access during bank hours to the strong-room where plaintiff's securities were kept—no restraint by locks, bolts, or limitation of the use of the key to those locks to one or more confidential servants. I can hardly doubt the view which would have been taken in such a case. [The learned Judge here referred to the particulars of this case.] The unsuccessful prosecution by the appellant of one of his clerks for embezzling of these or similar articles tends also to the conclusion that as a matter of fact the respondent's property was not improbably taken by some of these persons who, in my judgment, were not proper persons to have access to the place of its deposit.

Under these circumstances the decision of the Magistrate must be affirmed and the respondent retain the compensation awarded him.

KOH BOO AN *v.* TIOH JEE.

PENANG.
WOOD, J.
1883.
Sept. 13.

A laborer contracted, in consideration of certain advances for his passage money, &c., and a promise by the employer to pay him small monthly wages, to serve his employer, as a laborer on his estate, for a period of 360 days; and should he borrow of his employer sums of money in excess of the wages and advances agreed to, that he would not abscond or run away or otherwise leave the estate before having paid the amount of work agreed to, or the monies borrowed in excess of his due. He thereafter worked out his 360 days, but during this time drew monies in excess of his due. After the 360 days were over, he refused to work any longer under the contract at the wages therein specified, but having drawn in excess of his due, he remained on the estate ready to work at the usual wages of the country, and neither absconded, ran away or otherwise left the Estate. The employer considering he was entitled to the laborer's services beyond the 360 days, until the amount drawn in excess of the man's due for that period was paid off, by wages stipulated for in the contract, charged the laborer under section 14, clause 5 of Ordinance 1 of 1882, with absenting himself from his employer's service,—

Held, on appeal, affirming the decision of the Magistrate, that there was no absenting himself [by the labourer] from his employer's service, as there was nothing in the contract requiring the labourer to work beyond the 360 days; that the laborer had done all he contracted to do in consideration of his being in his employer's debt, by remaining on the estate without absconding or running away or otherwise leaving the Estate, and the Magistrate was right in dismissing the case no sooner these facts appeared.

This was an appeal from the decision of J. K. Birch, Esq., Magistrate of Province Wellesley. The facts giving rise to it and the question involved in same, sufficiently appear in the judgment.

Thomas for appellant [the employer].

D. *Logan* [Solicitor-General] for the respondents [the Magistrate and laborer].

Cur. Adv. Vult.

October 22. *Wood*, J. This was an appeal against the decision of the Magistrate, the facts being as follows:

By agreement in writing, dated 6th July, 1880, after reciting that the respondent Tioh Jee, a Chinese coolie, with two other coolies were indebted to a certain Ee Kee for passage money from China to Penang and other monies, and had requested Koh Boo An the appellant, to come forward and pay for each of them the sum of $26, which sum is admitted to have been paid, it was agreed as follows:

1. The said laborers will proceed to Krian, [where appellant's estate was situated,] *and work their 360 days' work each*, at a rate of wages of $36 per annum.

2. Their employer shall give them their daily food in sufficient quantity, *and should they during their period of engagement absent themselves from their work through mere laziness or borrow from their employer sums of money in excess of the amount agreed to, they shall not abscond or run away or otherwise leave the estate, before having paid the amount of work agreed to or the monies borrowed in excess of their due.*

3. [Provides for the supply by the employer of certain garments or other such matters].

4. Should they become sick, their employer will provide them *gratis* with medicines and medical attendance, but should they contract venereal diseases, not only their employer will charge them for medicines and medical

attendance, but also make them compensate for the number of days they have absented from their work.

5. The usual Chinese holidays shall be observed as days of rest.

6. Their employer shall note on the back of this agreement, the number of days they have absented themselves from their work through laziness, or on account of venereal disease, together with the amount of money they have received in excess, and submit to the Protector of Chinese, or if beyond this Colony, to the local authority, that it may be examined, and the official chop impressed thereon, otherwise the annotations behind the contract will be considered of no value.

Under this agreement, Tioh Jee worked for 360 days, but had taken further advances from his employer, and had afterwards absented himself from the employer's service, or rather, as stated in the case as furnished by the Magistrate, refused to work any longer on the terms agreed on in the contract.

The respondent Tioh Jee, the coolie, was charged before the Magistrate for that "having received an advance in money and "agreed to work as laborer on the Perak Estate for 360 days, he "did, without reasonable excuse, *absent himself from his employer's* "*service*, and thereby committed an offence punishable under sec- "tion 14, clause V. of Ordinance 1 of 1882." This Ordinance, so far as is material to this case, is as follows:

Section 1. The interpretation clause "contract of service" shall include any contract to labor, whether in writing or verbal, otherwise than as a domestic or menial servant for any period of time or to execute as laborer any work.

By section 14, which treats of "adjudication" by the Magistrate, it is enacted:

Clause V. If the complaint relates, in the case of parties bound by a written contract of service, to neglect or omission on the part of the party complained against, without reasonable excuse to be allowed by the Magistrate *to fulfil the contract of service*, or if the laborer shall, without reasonable excuse to be allowed by the Magistrate, omit or refuse to enter on or commence his service, or if the laborer, *without reasonable excuse to be allowed by the Magistrate, absents himself from his employer's service*, the Magistrate may order the party complained against to fulfil the contract, and, if he thinks fit, may order such party to find forthwith good and sufficient security, with or without sureties to the satisfaction of the Magistrate, for the fulfilment of the contract, or may sentence him to rigorous imprisonment for any period not exceeding 3 months, and in the case of absence from or cessation of service, the Magistrate in addition to ordering that the wages of the party complained against be forfeited to his employer during the period of such absence, or cessation under the provisions of section 20, may order that the party complained against shall pay as a penalty, such sum not exceeding the amount of 30 days' wages as the Magistrate may direct; and if the order direct the fulfilment of the contract, and the finding of good security as aforesaid and the party complained against shall neglect or refuse to comply with such order, the Magistrate may, if he shall think fit, sentence such party to rigorous imprisonment for any term not exceeding six months.

On the case being called on before the Magistrate at Nibong Tebal on 6th January, 1883, it was admitted as above stated, that Tioh Jee had worked more than 360 days, but the employer was unable to state if any of the contract absence was still due as

WOOD, J. 1883.

KOH BOO AN v. TIOH JEE.

debts incurred by Tioh Jee while on the estate, had been included as part of the original advance.

The Magistrate considered that this was not a complaint cognizable under section 14, clause V. of Ordinance 1 of 1882, no breach of contract having been shewn, and the complainant having his remedy in a Civil Court, and dismissed the complaint without taking evidence, the facts being admitted. The case came before me on September 13th, 1883, on appeal from the Magistrate's decision.

Mr. Thomas for the appellant Koh Boo An [the employer], contended in the first instance, that the Magistrate had not made a proper return of the proceedings on the hearing before him, but I held that, under the circumstances of the case, the employer on stating the facts of the case which the Magistrate considered insufficient, those facts may be taken as proved, and it was not imperative on the Magistrate to proceed with a formal hearing, but that the facts properly came before me on the case as stated by the Magistrate.

Mr. Thomas on the merits of the appeal, further contended that by a fair construction of the terms of the contract, the coolie undertakes to work off the amount of advances received, and that if he fail to do so the Magistrate may, and should in this case have pronounced a penalty under section 14, clause V. of the Ordinance I of 1882. This Contract being a "contract of service" within the meaning of the Ordinance as being a "contract to labour" as explained by the interpretation section, section 1.

The Solicitor-General for the respondent [the coolie], contended that as this is a penal Statute, its terms must not be extended unless the language of the Ordinance is clear on the point—that in this case, the "contract of service" cannot mean the entire contract, but only so much of it as relates to the term of 360 days which was the service contemplated in the contract, and the only distinct term of service so contemplated, and that a contrary reading would let in great hardship inasmuch as the term of labour might be almost indefinitely extended by means of loans advanced by the employer, and further that as a matter of construction of the contract, there is no contract to labour to work off the advance at any fixed rate, but only "not to abscond, or run "away, or otherwise leave the estate before having paid the amount "of work agreed to [*viz.*, 360 days] or the monies borrowed in "excess of their due," and that in this case, the coolie has worked out the 360 days and has not absconded or run away, or otherwise left the estate, but was ready and willing to work at the usual wages of the Country though not at the wages fixed by the contract, and is ready on the spot to answer any suit for the amount of his debt at the hands of the employer.

In this latter view of the case, I fully concur. The Contract in its entirety I look upon as a "Contract to labour," and as such a "Contract of Service" within the meaning of section 14 of the Ordinance 1 of 1882, clause V., and the Magistrate has authority, as it appears to me, to act in the case of such a contract as this, to deal with any laborer *who absents himself from the service of the*

employer if he had contracted *to serve him* after the completion of the term of 360 days had expired in order to work out the equivalent in labour, of the advances in money made to him, but by the Contract in question I do not find that the laborer has made any such engagement. So far as I see he has acted within his Contract by not leaving the Estate after the completion of his 360 days' work, and in the absence of any specific engagement to work for the employer after their 360 days' work are concluded, I cannot think there has been any failure on the part of the coolie to fulfil the terms of his engagement, and the appeal will in consequence be dismissed with costs.

MAT SALLEH *v.* SARAH.

The entry and taking possession of property under the *bonâ fide* belief of a right thereto, and in assertion of such right, although accompanied by high-handed acts, which insult or annoy the person in possession,—provided such acts are merly incidents to the assertion of title, and not done with the primary intention of insulting or annoying,—do not make a person liable to be convicted under sections 441 & 447 of the Penal Code.

The appellant Mat Salleh, had been convicted by J. K. Birch, Esq., Magistrate of Province Wellesley, of criminal trespass under section 447 of the Penal Code, and sentenced to two months' rigorous imprisonment, and to pay a fine of $25 which was to go to the complainant [respondent], as compensation. The evidence for the prosecution was to the effect that the respondent was possessed of a house in Province Wellesley, but having occasion to go to Kuala Muda, she left the house with all her property, consisting of wearing apparel, crockery and goats, in the place. During her absence from the house, but immediately after her return from Kuala Muda, the appellant entered the said house, and attempted to pull it down. She called certain neighbours, who came, and on being informed by the appellant that he had purchased the house of one Samat, they pointed out a house to him which they said was Samat's, and told him the house he was attempting to pull down was never Samat's, but the respondent's. The appellant thereupon desisted and left. Two days after however, he returned with certain workmen, and again began taking down the house ; he was again spoken to by the respondent and neighbours, but in spite of their protestations, he threw out the apparel and crockery, breaking and smashing them in the act, released the goats, and took the house completely down and carried away the materials. The appellant denied this account and called evidence to the effect that the house in question was Samat's, and had been purchased by him [Samat] of one Mun ; that Samat had thereafter sold the same to the appellant, in the presence of the respondent, who then raised no objection thereto, that shortly after the purchase, he took the house down and carried away the materials two days after; that the house was empty at the time he entered it, and the story told regarding the

WOOD, J. 1883.

MAT SALLEH v. SARAH.

crockery, goats, &c., was an exaggeration of the facts of the case, and false. The case as stated by the Magistrate did not shew what he exactly found as to matter of fact, beyond that in his opinion the appellant was guilty of criminal trespass, and he accordingly sentenced him as stated. The appellant having appealed,

Van Someren for appellant now contended that the entry was in *bonâ fide* assertion of a right, or at least under the impression that the house was the *bonâ fide* property of Samat, which the appellant had purchased. To come within section 441, which defines what criminal trespass is, the entry must be done with the primary intention "to commit an offence, intimidate, insult or annoy." Here the primary intention of entering was in assertion of right, and the annoyance resulting from the act was not the primary object of the entry, and could not make the act criminal. The criminal law had here been carried too far. He relied on *Iswar Chandra Kurmaker* v. *Sital Dass Mither*, 8 Beng. L. R. App. 62; *Gokul Chund* v. *Shith Roshun Lal*, 2 N. W. P. H. Ct. Rep. 82; *Shristadhar Parol* v. *Indrobhosun Chukerbutty*, 18 W. R. Cr. 25; *Mayne on the Penal Code*, 355; *Currie on the Penal Code*, 355.

Ross for respondent, contended that the cases cited were not applicable. In this case there was an excess in the manner of taking possession which shewed the intention was not merely to take possession of the house, but to insult and annoy. The Magistrate might reasonably be held to have found that the house was the respondent's and in her possession; that appellant had reason to know that he had no right to it from the information of neighbours, who were called. He goes away and returns the second day with full knowledge of the facts, and persists in his illegal acts; it was then, the whole affair was accompanied by violence and outrage. *Reg.* v. *Ram Dyal Mundle*, 7 W. R. Cr. 28; *Reg.* v. *Jenut Bebee*, 1 W. R. Cr. 46; *Reg.* v. *Surwan Singh*, 11 W. R. Cr. 11; *O'kenealy on the Penal Code*, 257, 8.

Van Someren in reply, contended that on the evidence it must be taken that the appellant only maintained what he considered his right; any excess of force in asserting same, afforded no ground for his being proceeded against criminally. *Reg.* v. *Pearson*, 5 L. R. Q. B. 237.

Wood, J. The law being clear to me that the act is not criminal within section 441 of the Penal Code, if the appellant in this case acted as he did, on a *bonâ fide* belief of right, and it not being clear to me that the Magistrate in the Court below, had this view of the law clearly before him, I think I must remit the matter to him for a rehearing, leaving him to find, whether the appellant [the defendant] did as a matter of fact, do the several acts complained of, *viz.*, the entry on the first occasion and the entry on the second occasion, and scattering the crockery and fowls, with the primary intent to annoy, or merely as incidents to a *bonâ fide* claim of title, and belief in his right to do so. Both parties will have liberty to call further witnesses.

Case remitted accordingly.

18th February, 1884. The case having been remitted and

further evidence taken by the Magistrate, the same was now returned into Court by him, without any finding as to whether the acts done by the defendant were done in the *bonâ fide* assertion of right, or with intent to injure or annoy. The nature of the further evidence taken was much the same as the previous evidence called by the appellant, that he had purchased the house of one Samat; that the respondent Sarah was not the owner thereof, but was present at such sale and never objected. The appeal now came on for final hearing.

Ross for the respondent, on the appeal being called on, moved that the case might be again remitted to the Magistrate to make his finding as directed.

Van Someren for appellant submitted, as the whole of the evidence was now before the Court, it could pronounce a judgment on such a question, and that to send the case back to the Magistrate, and the appellant, a poor man, backwards and forwards, would be a great hardship.

[*Wood*, J. considered that as the Magistrate was silent as to his finding, the presumption was, that he found against the appellant, and adhered to his original decision.]

Van Someren then addressed the Court on the merits, submitting that it was a mere question of title,—that the criminal law had been strained in being applied to this case, which at most only shewed a wrong for which the respondent had a civil remedy.

Ross contended that the act of the defendant was criminal; he had been warned not to remove the house, had stopped that day and had come again two days after and persisted in removing it.

[*Wood*, J. remarked thatthat rather told in his favor as it shewed that he was not a man who wished to act rashly,—but having considered the objection of the respondent, he was firmly convinced in his own mind that he had a right to the house, and so removed it.]

Ross then contended that the throwing of the crockery and property out of the house, the letting go the fowls, ducks and goats—the removing of the house over the head of the respondent—in fact acting in so high-handed a way,—were all acts done to insult or annoy—and from the whole case, and from the finding of the Magistrate, must be taken to have been done with that intention.

Wood, J. The case being now remitted with further evidence, I observe that though the case was sent back for the Magistrate to hear and determine anew, he has not in fact found anything, but has heard and not determined. But assuming that the original finding of the Magistrate is supported by his present return, I am of opinion that the Magistrate has leant too much to a criminal view, in his dealing with this case. Although some of the acts of the defendant might have been the cause of injury and annoyance to the complainant, yet I think, he may reasonably be taken to have done what he did, in pursuance of a right. The evidence is not sufficient in my opinion, to support a criminal charge. The conviction will therefore be quashed.

Conviction quashed.

REGINA *v.* KHOO SEE HEE & ORS.

PENANG.

WOOD, J.
1884.

Feb. 25.

The appellants were members of a secret society, and were found standing in front of the Society or Kongsee House, in which apparently several others were assembled. They, in company with the others, fled on the approach of the Police, who visited the said house in consequence of information that the members of that society were gathering there, with the view of attacking another society. The appellants were however arrested by the Police, and in the Kongsee House were found a great number of clubs or poles, apparently intended as weapons of offence: some of these were thrown about the house, while others, in bundles, were hidden,

Held, [quashing the adjudication of the Magistrate who convicted the appellants of being members of an unlawful assembly, under section 149 of the Penal Code], that there was no reasonable evidence that the appellants formed part of the assembly, or had any common object of committing a breach of the peace.

The word "assembly" in section 149, has the ordinary meaning of the word, and means a meeting of persons in the same place, so as to be able to communicate freely with each other.

The appellants were convicted by C. W. S. Kynnersley, Esq., of being members of an unlawful assembly, under section 149 of the Penal Code. The evidence shewed that the Protector of Chinese, having been informed that the members of the Ho Seng Secret Society or Kongsee, contemplated an attack on the members of another society, and that they were gathering in numbers at the Kongsee House of the society,—immediately set out with a body of Police for such Kongsee House. On arrival there, they saw several persons, both inside and outside the Kongsee House, who, on their approach, ran off in different directions. The six appellants were among those standing in the verandah of the Kongsee House when the Police approached, and ran into the house. They were taken into custody, and the house searched, a great number of sticks, from their appearance evidently intended as clubs or weapons of offence, were found in various parts of the house, some in bundles, hid behind the doors and elsewhere. These appellants, it was shewn, were members of the Ho Seng Kongsee. The informer was not called, and no further evidence was laid before the Magistrate. The defendants called no witnesses, but severally alleged they had gone to the Kongsee House as a place of rest, each having come from distant parts of the Island. The Magistrate having convicted them, the present appeal was brought.

F. H. *Gottlieb* for the appellants, contended there was no evidence to shew the assembly was unlawful or that a breach of the peace was intended, beyond the hearsay evidence of the Protector.

Wood, J. remarked there was apparently no assembly within the meaning of section 149, and called on

Ross [for the Solicitor-General], who contended there was obviously a gathering at the Kongsee House, of Ho Seng's, exceeding five in number, and this was a sufficient assembly; and as to the unlawfulness thereof, the fact of the men gathering in large numbers, of running away at the approach of the Police, and the weapons and clubs found in the Kongsee House, shewed the object of the gathering.

Wood, J. I am of opinion that within the ordinary meaning

WOOD, J. 1884.

REG. v. KHOO SEE HEE & ORS.

of the word assembly,—which I understand to be a meeting of persons in the same place, so as to be able to communicate freely with each other,—there was no reasonable proof that the six appellants formed part of any such assembly; and I am further of opinion that the facts shewn in evidence, although they may form cause for just suspicion as against the appellants, do not reasonably shew any common object of committing a breach of the peace.

I may add, that I entertain a strong moral conviction that the appellants were contemplating a breach of the peace, and although I am bound to decide that the charge in its present form was not sustained by the evidence, yet I do not desire to express any opinion reflecting upon the conduct of the Magistrate or the Police, in dealing with the case. The conviction will be quashed.

Conviction quashed.

REGINA *v.* AW ENG THO.

PENANG.

WOOD, J. 1884.

May 5.

"Occupier," in section 2 of the Gaming House Ordinance 13 of 1879, means a person having actual, and not merely constructive occupation, of the place alleged to be the Gaming House.

In order to prove that a place is used as a Gaming House, so as to render the owner or occupier thereof liable under the Act, it is necessary to shew, by direct evidence, that the place had been so used; or, if there are convictions against persons, for having been found gaming in such place, the formal records of such convictions must be produced, and *viva voce* evidence of the fact of such convictions, is inadmissible.

The appellant was charged before W. Egerton, Esq., for that he, on the 2nd June, 1883, and 31st December, 1883, being the occupier of a house No. 131, Beach Street, Penang, did keep and use the same for the purpose of carrying on the business of a common gaming house, an offence punishable under section 2, clause 1, of the Gaming Ordinance 13 of 1879.

From the evidence, it appeared that the appellant had a general store in the front portion of the premises No. 131, the back portion of which was used as store-rooms. The house extended from Beach Street to the sea, and was one large building, at the back of which, upstairs, was a room with an outlet leading to the roof, with a sky-light just above it. To the house there were two staircases, one leading up to the front, and the other to the room before described; at the top of the latter staircase, was a folding trap-door. It was proved, that in order to get to the staircase leading to the said room, it was necessary for one to enter through the general store kept by the appellant. The respondent [the Inspector of Police in charge of the case], declared he had known the house for the past twelve months to be a common gaming house, and that on the said 2nd June, 1883, he had arrested 8 men in the room, and had charged them before the Magistrate, with being present in a common gaming house,

WOOD, J. 1884. REG. v. AW ENG THO.

when they were fined $5 each,—he also gave the number of this case as No. 2476,—and further stated that on the 23rd December, 1883, 18 men had been arrested in the same place, and fined $10 respectively on a similar charge;—and also that on the said 31st December, he had arrested 7 other men in the same place, who, on being charged with the like offence, were also severally fined $10; that these convictions had never been reversed or appealed against, and were still in force. A clerk to the Municipality was also called, and he produced a Register of "occupiers" of premises in George Town, Penang, in which Register appeared the name of appellant, as sole "occupier" of the premises No. 131, Beach Street; he also stated he recollected 6 months previously, the appellant coming to the office of the Municipal Commissioners, and paying the assessment for the whole building.

The appellant in his defence stated that he only rented the front portion of the house, which he used for the purposes of his trade, and knew nothing whatever of the gambling—he called one witness as to his character and trade. The landlord of the house was called by neither party. The Magistrate was of opinion that it had been proved that the appellant was the "occupier" of the whole of the premises in question, and had allowed part of those premises to be used for the purpose of carrying on the business of a common gaming house, and accordingly convicted him under section 2, clause 2, of the aforesaid Ordinance, and sentenced him to a fine of $250. The following are the sections of the Ordinance in question, material to this case.

"2. Whoever commits any of the following offences, 1st. Whoever, being the owner or occupier thereof, keeps or uses a place for the purpose of carrying on the business of a common gaming house; 2nd. Whoever, permits a place of which he is owner or occupier, to be kept or used by another person for any such purpose as aforesaid . . . . . shall be punishable able, &c., ... "

. . . . . .

"12. Whenever any passage, staircase, or means of access, in a place lawfully entered as aforesaid, to any part thereof is unusually narrow or steep or otherwise difficult to pass, or any part of the premises is provided with unusual or unusually numerous means for preventing or obstructing an entry, or with unusual contrivances for enabling persons therein to see or ascertain the approach or entry of persons, or for giving the alarm, or for facilitating escape from the premises, it shall be presumed, until the contrary is shewn, that the place is a common gaming house, and that the same is so kept or used by the occupier thereof; . . . . . "

The appellant now appealed against the aforesaid conviction.

Thomas for appellant. "Occupier" of the premises under the Ordinance means a *de facto* occupier. The Inspector speaks of defendant as occupying only the front shop, and the proof of payment of assessment by the appellant is no proof of occupation at all,—there was also no proof that the defendant was actual occupier during the several periods when the alleged gamblers were arrested. The fittings of the house, and the alleged gaming room, were not unusual, or such as come within the provisions of section 12, so as to raise a presumption as to the place being a

common gaming house. There was no legal proof that it was a common gaming house, nor was there any legal proof of the alleged convictions by production of the records. The evidence of the Inspector was no evidence thereof, in point of law.

Ross [*acting Solicitor-General*] for respondent. All that it was necessary to prove was, that appellant was occupier of the room, between the dates the men were found gambling, and that gamblers had been arrested on and between those dates. The defendant was proved to be the occupier of the whole premises by the evidence of the Inspector and of the Municipal clerk, the latter of whom also spoke of payment of assessment for the entire premises by the appellant. "Occupier" did not mean *de facto* occupier, as section 2, clause 2, speaks of the "occupier" permitting others to use the place,—from which it followed, that the occupier's occupation, was only through that of the persons he so permitted. The evidence shewed that the gaming room could only be entered through the shop which the appellant himself in his defence admitted to be in his occupation; he could not therefore but have known of the gambling, by reason of the persons who must have gone to and fro. The room was proved to be sued by gamblers by the evidence of the Inspector, who, of his own knowledge, spoke of having arrested such persons there. It was not necessary to produce the formal convictions of the men.

Wood, J. I am of opinion that no occupation within the meaning of the Ordinance has been proved. Proof of actual, and not constructive occupation, is, in my judgment, necessary to sustain such a conviction as this; the Inspector only proves that the front shop was occupied by the appellant, and the evidence of the Municipal clerk, only shews that defendant paid assessment for the whole house. This latter however, is no proof, *primâ facie* even, of actual occupancy, for the landlord or his tenant, may very well pay, according to arrangement, assessment for a portion not occupied by him. There is also in my judgment, no legal proof that the room in question was used as a common gaming house, proof should have been given by the direct evidence of the Inspector or others, that the premises were so used,—or if, as in this case, there were convictions, such convictions should have been proved in regular form by the production of the convictions themselves. The Inspector's evidence was but parol evidence of matters of record, and so inadmissible; it should have been rejected by the Magistrate. The conviction will be quashed.

Conviction quashed.

TAN SIM TEE *v.* OPIUM FARMER.

PENANG.

WOOD, J.
1884.

May 5.

Where chandoo is not found in the actual occupation of the prisoner, and there is any ground for supposing that the place in which it is found, is not in his usual occupation,—fair evidence should be adduced by the prosecution to shew, that he had some sort of occupation of that place, in order to make the actual occupier's occupation, the occupation of the prisoner.

This was an appeal from the decision of W. Egerton, Esq., Magistrate. The facts were these: the appellant was a trader living in one of the new roads leading off Bridge Street, and was an opium-smoker. The respondent had obtained a search warrant to search his house for illicit chandoo; and on his Revenue Officers and Police attempting to enter the house, found the front door closed against them. It was about seven in the evening. The door was broken open, and an entrance effected, and on searching the prisoner's room, the Police found a small horn-pot of chandoo remains, which, it was said, on being tested, was not farm chandoo; a pipe which was still warm, and an opium-smoking lamp which had evidently just been put out. In an adjoining room, to which access could not be had from the prisoner's room, was found a tin of illicit chandoo hidden in a hole, and partly covered over with rubbish. This room had no door to close same, and was immediately by a passage [in the house] leading to the tap at the kitchen, which passage and tap, it was said, was used by a great many persons, friends of the prisoner, as also by inmates of the house. This room was used as a lumber room, and was also used by the prisoner's servant as a sleeping place. After all the evidence had been taken in this case, but before the Magistrate had found his verdict, the Usher of the Police Court was called, and proved a previous conviction against the prisoner a few months before, when he pleaded guilty to a charge of a similar nature and was fined $400. On the close of this evidence, the Magistrate convicted the appellant on the present charge, and sentenced him to a term of imprisonment as well as to a heavy fine. The search was made, and the said tin pot of chandoo found on the 20th February, 1884; the case was tried by the Magistrate on the 10th of March following. The formal conviction which was dated the 10th March, and alleged the adjudication to have taken place before that day, alleged the offence to have been committed on the *20th March, 1884*; it also omitted the word "knowingly" before the words "had in his possession"; and the chandoo was said to be "in the possession, custody *and* control" of the appellant instead of one of the alternative cases. The prisoner appealed against the conviction.

Van Someren for appellant, submitted that the evidence did not shew the chandoo to have been in the possession, custody, or control of the prisoner,—sec. 13 of Ordinance 4 of 1870. If it was in the possession or control of anybody, it was in that of the prisoner's servant, and if the present conviction could be upheld, any gentleman might be convicted of having illicit chandoo, whose servant had hidden away some, in his [the servant's] private room; the Magistrate must have had some doubt of the prisoner being cognizant of his servant's possession of the chandoo, and had there-

fore omitted the *scientèr* in the conviction. He also contended the conviction was bad for want of a *scientèr*, for stating the offence to have been committed on a date later than the adjudication—for the cumulative form of the charge; and because there had been a wrongful admission of evidence, the previous conviction.

Ross, for the respondent, as to the last point submitted that as no miscarriage of justice had been caused, the improper admission of evidence was immaterial, [section 34, Appeal Ordinance 12 of 1879]; as regarded the *scientèr*, the date of the offence, and the cumulative form of the conviction, they were all matters of form, and did not go to the merits of the case, and could be amended under section 33 of the Ordinance; and as regarded the merits, the whole facts pointed to guilty knowledge, and the horn pot of illicit chandoo remains, found in the prisoner's own room, shewed conclusively his possession of and dealing with illicit chandoo. It was a case, to say the least, of strong suspicion, and the Magistrate having come to the conclusion that the prisoner was guilty, this Court would not disturb the verdict.

[At the suggestion of the Court, and by consent of both parties, the conviction was taken as amended, and proper in form].

Wood, J. I am of opinion that on the merits, the case, although one of strong suspicion, is not sufficiently strong to warrant the conviction. The chandoo was not found in the actual possession of the prisoner; and in my judgment, where there is any ground for considering the room in which chandoo is found is not the room in the usual occupation of the person charged, fair evidence should exist that the person charged has some sort of occupation of that room, in order to make the actual occupier's occupation, the occupation of the person charged. Such evidence I think, is wanting here, and the conviction will therefore be quashed on that ground. As the case however, is one which has disclosed great carelessness in the person who had the drawing of the conviction, I think I must call the attention of the Solicitor-General to the defects in that conviction, with the view to the matter being taken notice of by the Magistrate, and greater care in future secured. There is the error in date, 20th March for 20th February, there is the absence of the *scientèr*, and there is the cumulative form of the charge—" possession, custody *and* control," instead of " possession," *or* " custody," *or* " control," according to the facts. Then again I must call attention to the further fact, as would appear from the form of the proceeding, that evidence of a previous conviction was given before the Magistrate had made any decision. It is a well understood practice in criminal cases before the Court, to keep back such fact of a previous conviction from the mind of the Jury, until their verdict is given, and by a parity of reasoning, such fact or charge should be, if possible, withheld from the convicting Magistrate, before his decision. The conviction will be quashed, and the fine remitted.

Conviction quashed.

In re S. S. CHI YUEN.

SINGAPORE.

FORD, AG. C. J. 1884.

August 5.

A Magistrate has no power under the Excise Ordinances 4 of 1870, 6 of 1879 or 4 of 1884, to order the forfeiture of a ship, on board of which illicit chandoo is found.

Semble. This Court is the proper tribunal for making such order. [*a*]

Donaldson on behalf of the owners of the above-named steamship, had, on a former day, obtained a Rule calling on H. T. Haughton, Esq., Magistrate of Police, to shew cause why a writ of prohibition should not issue, prohibiting him from ordering the forfeiture of the said steam-ship [until the master and owners thereof, had been brought before him in due course of law]. † The facts giving rise to the case, sufficiently appear from the judgment. The following are the sections of the Excise Ordinances bearing on the subject:—

"The importation of Chandoo or Opium Dross into any Settlement is prohibited, and any person who shall import or attempt to import Chandoo or Opium Dross into any Settlement, shall be liable on conviction to a fine not exceeding five hundred dollars or to imprisonment of either description for any period not exceeding six months, or to both fine and imprisonment, and for every second or subsequent offence to a fine not exceeding one thousand dollars, or to imprisonment of either description for any period not exceeding twelve months, or to both fine and imprisonment, and the Chandoo or Opium Dross shall be forfeited. Any person having on board any ship on its arrival within the limits of the Colony, any Chandoo or Opium Dross except such as might properly be required for the use of the crew or passengers on the passage of such ship as sea stores, shall be deemed to have imported the same." [Ord. 4 of 1884, sec. 7.]

[For Section 7 B, see judgment.]

"All convictions under this Ordinance may be had before a Magistrate of Police, and may be in the form set out in Schedule [R]; and the provisions of the Indian Acts 13 of 1856 & 48 of 1860, for the arrest, bail and detention of offenders, and for the issue of warrants, summonses and subpœnas, and procedure, and for convictions and levy of fines under these Acts, shall, when not inconsistent with the provisions of this Ordinance, and not otherwise hereby provided for, be applicable to all cases under this Ordinance." [Ord. 4 of 1870, sec, 76.]

"The period of imprisonment imposed by a Magistrate in respect of the non-payment of any fine under this Ordinance or in respect of the default of a sufficient distress to satisfy any such fine, shall be such period of such description, simple or rigorous, as in the opinion of the Magistrate will satisfy the justice of the case, but shall not exceed in any case the maximum fixed by the following scale, *viz*:

Where the fine	That period shall not exceed
Does not exceed twenty-five dollars	Two months.
Exceeds twenty-five dollars but does not exceed fifty dollars...	Four months.
Exceeds fifty dollars but does not exceed one hundred dollars	Six months.

with an additional two months for every one hundred dollars after the first

[*a*] See *The Friends*, Admiralty Cases, Vol. II. of these Reports, p. 1.

† The words within brackets were struck out on the argument of the Rule.

one hundred dollars of the fine, until a maximum period of twelve months is reached, provided always that:—

[*a*] if before the expiration of such period of imprisonment, such a proportion of the fine be paid or levied as is not less than proportional to the unexpired portion of such period, the imprisonment shall terminate;

[*b*] where a person is sentenced to both fine and imprisonment, and the fine not being paid is commuted into imprisonment, such imprisonment shall be in addition to the imprisonment ordered by the original sentence." [Ord. 4 of 1884, sec. 78.]

"On any trial before any Magistrate, and in any proceeding on appeal in the Supreme Court relating in any of the above cases, to the seizure of *contraband articles* under this Ordinance, it shall be lawful for the Judges of the said Court and for the Magistrates, and they are hereby respectively required to proceed to such trials and to the hearing of such appeals on the merits of the case only, without reference to matters of form, and without enquiring into the manner or form of making any seizure, excepting in so far as the manner and form of seizure may be evidence on the merits." [Ord. 4 of 1870, sec. 79.]

[For Section 81, see Judgment.]

"All fines received under this Ordinance shall, after the adjudication of a portion of the same, not exceeding one-half at the discretion of the Magistrate, to the informer, be paid to the farmer prosecuting the case, or whose privileges have been infringed, and all articles, subject to restriction under this Ordinance, seized and forfeited, shall be given to the farmer prosecuting the case, except when such articles are declared by the Magistrate to be unfit for use, in which case they shall be destroyed. All ships forfeited under this Ordinance shall, if the Governor-in-Council so direct, be sold, and the proceeds of sale thereof be paid into the Treasury for the purposes of the Colony, and all fines levied against any farmer shall be paid into the Treasury for the use of the Colony. Provided always, however, that the said fines or proportion thereof, shall not be paid to the several farmers under the leases of their farms at present current, unless it shall be so ordered by the Governor-in-Council as to all or any of them, and failing such order, such fines shall, in the meantime, be paid into the Treasury for the use of the Colony." [Ord. 4 of 1870, sec. 84].

"It shall be lawful for the Governor to suspend or stop any prosecution or proceeding instituted or proposed to be instituted under this Ordinance, and to direct the refund of the whole or any part of any fine or penalty, and the restoration of any ships ordered to be forfeited, and the restoration of the whole or any portion of any articles ordered to be forfeited, to any person from whom the same may have been taken." [Ord. 4 of 1870, sec. 85.]

Bonser [*Attorney-General*] shewed cause.
Donaldson, supported the Rule.

Cur. Adv. Vult.

August 12. *Ford*, acting C. J. A Rule *Nisi* calling upon Hancock Thomas Haughton, Esq., a Magistrate of Police, to shew cause why a writ of prohibition should not issue prohibiting him from proceeding further in the matter of the forfeiture of the S. S. *Chi Yuen* until the master and owners have been brought before the Court by due course of law, was applied for by the master and owners of this ship on the 31st July, and granted and made returnable on the following Tuesday, the 5th of August. Upon that day, the Attorney-General appeared against the Rule being made absolute, and Mr. Donaldson to sustain it. On the objection of the Attorney-General, with the consent of Mr.

FORD, AG. C. J. 1884.

In re S. S. CHI YUEN.

Donaldson, so much of the application was struck out as seemed to allow a jurisdiction in the Magistrate, if the master and owners were brought before his Court by due course of law, and the question for decision, was confined to whether or no the Magistrates' Courts of this Colony have a right to order the forfeiture of a vessel for certain offences under the Excise Ordinance 4 of 1870 and 4 of 1884. The master or owners were not, as a matter of fact, parties to the proceeding before the Magistrate. The case is one of very great importance, whether regarded from the point of view of owners who, as in this case, are said to own some 40 steam vessels, the one under seizure being alone worth $100,000, and of those who may be owners of vessels of a very much higher value; or from the Revenue Officer's point of view, so large a proportion of the revenue of these Settlements depending upon a vigorous and effective administration of its revenue laws. It was stated during the argument, that arrangements had been judiciously made by the Government, by which an actual stoppage of the vessel had been avoided, certain bonds having been given by the owners to meet all eventualities. The facts of the case were so far not in dispute, *viz.*, that on the 18th July, the ship was searched and some $400 worth of chandoo found among the effects of the crew, the vessel seized, and the men proceeded against. The Opium Farmer applied for the forfeiture of the vessel under clause 7B of the Ordinance before referred to [4 of 1884], and the Magistrate expressed his intention to proceed to adjudication on the question of such forfeiture. It was assumed also on both sides, that the amount of chandoo seized exceeded 10lbs. in weight.

There is no question of the liability of a ship to seizure and detention and to ultimate forfeiture, if the circumstances which render her owners liable to such a penalty, are proved against them, unless the Governor, in the exercise of certain powers given him, notably by section 85 of the Ordinance of 1870, should otherwise determine. The question now for consideration, is whether or not the Magistrates' Courts have had given them a jurisdiction to order the forfeiture of the vessel, or whether such question of forfeiture is to be tried before some other tribunal. I have considered with great attention the contention of the learned Attorney-General, that by the conjoint operation of some prerogative of the Crown and the Ordinances of 1870 & 1884,—that immediately upon the conviction of a person for smuggling 10lbs. of opium, the vesssl is *eo instanti* forfeited, and that either by some inherent powers of the Crown, or some jurisdiction given by these Ordinances, or by both combined, the Magistrate, as the agent of the one, or by the mandate of the other, has power to settle the whole question of forfeiture, irrespective of any further adjudication, and subject to no appeal but such as it is suggested he might possibly have under section 79 of the Ordinance of 1870—a right which I am of opinion is, by the words of that section, clearly confined to cases of seizure of "contraband articles" only. To support a contention so grave in its results—such as would endow Magistrates with powers of adjudicating upon questions of pro-

perty, varying as the larger vessels which frequent this port do, in value from £20,000 to £150,000, when the Legislature has thought proper in all other cases to confine their powers to a few hundred dollars, and in Civil Cases to no more than a total of $50, —certainly the prerogative should be clear and equally, certainly should the language of the Ordinance be explicit, or at least its words be sufficiently clear to put the inference beyond a reasonable doubt. I have not been able to trace any prerogative in the Crown in the matter beyond that which—when forfeiture has already been vested in it by Statute and adjudicated upon under their provisions—have been declared to give it a right as against a subsequent seizure of the thing forfeited. Even this seems to have its exceptions. The passage cited from Mr. Chitty's work on the *Prerogatives of the Crown* [pp. 225, 226], to sustain the argument, goes, I think, no further than this, and I cite it in full:

"To consider the various cases in which the right of the Crown to goods forfeited for breach of the Revenue law, obtains, would lead one into a detail of the Revenue laws; a subject *principally founded on the positive enactments* of the legislature. It may, however, be remarked, that when forfeitures of this description are incurred, they accrue instantly to the Crown, and will not be divested by a subsequent *seizure* of the same article, as a droit of Admiralty, or otherwise; though, as the Admiralty proceeds *in rem*, a *judicial sale* of a vessel, &c., as a derelict, without fraud, is available as against the Crown's right of seizure for a previous forfeiture under the Revenue laws."

The text is supported by a reference to 3 *Price's Reports*, 97 [*a*].

We are then, I think, practically limited to the words of the Ordinances and the powers which they give, and the most important section, and the one which must first claim our attention is section 7 B of the Ordinance of 1884, repealing part of section 7 of the Ordinance of 1870. That section is as follows:

"Any ship which shall be used for the importation, landing, removal, carriage, or conveyance of any chandoo or opium dross, contrary to the provisions of this Ordinance, shall be forfeited and may be seized and detained until adjudicated on according to law. A ship on board which chandoo or opium dross is found, contrary to the provisions of this Ordinance, in amount exceeding 10lbs. weight, shall be deemed, until the contrary be proved, so unlawfully used as aforesaid."

I do not attach any importance to the words "shall be forfeited," preceding the "may be seized and adjudicated on according to law," because it is obvious that no forfeiture can take place before some adjudication according to law has taken place, in which the master or owners have had the opportunity of disproving the assumption of guilt, arising from the presence of the 10lbs of opium.

The section however, manifestly, neither by express words, nor by implication, gives the Magistrates any power to adjudicate,

[*a*] *Attorney-General* v. *Norstedt*—See also *Score* v. *The Lord Admiral*, Parker, 273.

FORD, AG. C. J. 1884.

In re S. S. CHI YUEN.

and the declaration "shall be forfeited" is no more than a declaration of the punishment for the offence, similar to those found in any penal enactment, and *e.g.*, where, as in section 226 of the Penal Code, a person guilty of returning from deportation, it is said, shall be punished with penal servitude for life. Such words confer no special jurisdiction on any particular Court, and come into operation only, of course, after the trial of the accused in the ordinary way.

We have therefore to find, if possible, in some other part of these Ordinances, the creation of this jurisdiction in the Magistrate, and I confess not only to have been unable—except in one instance from which such intention might be inferrable, and to which I shall presently refer—to find anything to sustain the contention; but the Magistrate's powers, wherever alluded to in express terms, or by language of clear implication, seem strictly confined to certain fines and confiscations of persons and contraband articles, and no section confers upon him the extraordinary powers now claimed. The sections referring directly or by implication to his jurisdiction—substituting those enacted by the Ordinance of 1884 for those repealed in the Ordinance of 1870,—are the 7th, 76th, 78th, 79th, 81st and 84th, [sections read], † and in none of them, except the 81st, to which I have before alluded, can I find any language to confer such a jurisdiction; and in every case where the forfeiture of a ship is referred to, the language seems to speak of it apart from the actions of the Magistrate. Section 81 however, reads thus: "Whenever in this Ordinance exciseable articles are directed or permitted to be seized or forfeited, the vessels and packages, and the carts, carriages and conveyances, and ships in which the same may be found, may also be seized and forfeited;" and I was asked to infer, because some officer or the Magistrate had jurisdiction to seize and forfeit exciseable articles, he had a like jurisdiction in the case of ships. I think the inference would be far too strong. The language is perfectly well satisfied by leaving the declaration of liability to forfeiture as it stands; and to infer from such a conjoint declaration of penalties the creation of such an unwonted jurisdiction, of which, as far as I can see, no trace is given in the sections of the Ordinance dealing directly with the Magistrates' powers, would be arbitrarily to import into the section, something not there, rather than to draw a legitimate inference from its language. I am much confirmed in the correctness of the view which I have taken, by a reference to the Proceedings in the Legislative Council when the Ordinance of 1884 was under discussion. The view of the learned adviser of the Government was clearly then, that the proper place to try questions of such magnitude as section 7B may involve, was the customary one of the Supreme Court; and acting upon that assumption, section 7B was introduced with an *addendum*, providing absolutely for the form of procedure in which the question was to be brought before it, *viz.*, "proceedings in the name of the Attorney-General

† *Vide antè* pp. 176, 177.

for the Colony, under the provisions of the Crown Suits Ordinance 1876." For some reasons, the addendum was, after a short consultation with the Executive Authorities, withdrawn, and I was myself therefore momentarily under the impression that there might be possibly something in the original Ordinance in conflict with what I had supposed the law naturally to be, and that possibly the original Ordinance had created a different tribunal for the trial of this class of offence. The present is the first occasion upon which the Ordinances, or either of them, have come before me judicially, and I cannot but come to the conclusion that this is not so, and that the then assumption of the Attorney-General was the correct one, and the adjudication according to law, must be in a Court having jurisdiction over property of such value as is likely to be the subject of proceedings such as these. The elasticity required for Executive dealing in particular cases seems to be amply secured by the provisions of section 85, which empower the Governor to stop or suspend any prosecution or proceeding instituted or proposed to be instituted under the Ordinance, and to direct the refund of the article, or any part of any fine or penalty, and the restoration of any ship ordered to be forfeited, by whatever Court.

I may in conclusion observe, that the form in Schedule B III. of the Crown Suits Ordinance seems to have been framed for the purpose of questions of forfeiture of ships being tried in this Court under the provisions of that Ordinance, and I have also carefully considered the provisions of the English Customs Act 39 & 40, Vict., c. 36, to get at the principles involved in dealing with similar questions. That Act does not indeed seem to contemplate anything in the form of forfeiture of large and valuable ships for the infringement of the Custom House laws, limiting such forfeitures to small craft, not apparently much over the value of £500. [Sections 169—209]. In these however, and in all disputes as to fines or forfeitures, even in respect of goods, it carefully provides for the adjudication, if the parties wish it, before the higher tribunals of the Country, at the suit of the law officers,—taking however, the proceedings before the Commission, or Justices of the Peace, as evidence in the Courts above, and throwing the onus of disproof on the defendant, [ss. 53, 207, 218, 226, 232, 247, 259, 260, 263 *et seq.*] Probably in cases of the seizure of vessels of small value, the grant to the Magistrates here of a similar jurisdiction would be very desirable; and proceedings in the Supreme Court, similarly regulated, equally so; but this is a question beyond the immediate subject before me.

The Rule must be made absolute, and the writ of prohibition go.

KADER KHAN *v.* HO FUK WENG & ORS.

PENANG.

WOOD, J. 1884.

August 25.

A Magistrate who tries a case under any of the sections enumerated in section 5, clause 2, of Ordinance 13 of 1872, which may consist of more than one charge, cannot sentence the prisoner on each charge, so that the cumulative term exceeds six months.

Semble. A Magistrate in *no case* has power to sentence for distinct offences, all tried together, for a cumulative term exceeding six months.

Query. Has he the power to do so, where each distinct offence is tried and dealt with separately, when by law they might have been tried together?

It is irregular, and improper, for a Magistrate to give a prisoner the option to be tried summarily, or be committed to the Assizes; or any option, in any criminal matter, at all.

The appellant, Kader Khan, a Corporal of Police, stationed at Sungie Burong, Balek Pulau, was charged in three distinct counts, under section 161 of the Penal Code, before W. Egerton, Esq., Magistrate, with receiving gratifications on three different occasions from the three several respondents, of three different sums of money. The three occasions all occurred within one year, and the charges were preferred under section 59 of Ordinance 6 of 1873, which enacts that, "when a person is accused of more offences "than one of the same kind, committed within one year of each "other, he may be charged and tried at the same time, for any "number of them, not exceeding three." The appellant was also charged under Section 384 of the Penal Code, with extorting the three several sums of money from the same three respondents. The Magistrate dismissed the charges of extortion, but convicted the appellant of receiving the gratifications, and sentenced him to four months' rigorous imprisonment on each of the said three counts, to commence the one on the expiration of the other. The formal convictions omitted to state that the terms were to run one in succession to the other, but as such was in fact the Magistrate's order, the conviction was amended by consent, in this respect. By the Summary Jurisdiction Ordinance 13 of 1872, sections 5 and 6, a Magistrate's jurisdiction is limited to six months' rigorous imprisonment and a fine of $100. By section 5, clause 2, the Magistrate is also empowered to deal summarily with offences [among others] under sections 161 and 384;—this clause is as follows: "All offences under any of the Chapters and Sections of the said "Code, in this sub-section named, in which the Magistrate may be "of opinion that *the case* will be adequately dealt with by imprison-"ment of the description, or either of the descriptions, applicable "by law to the offence, for a term not exceeding six months, or "with fine not exceeding one hundred dollars, or with both, "whether with or without whipping in offences for which whipping "may be lawfully inflicted, that is to say,—Chapter VII., section "137, Chapter VIII., section 144, &c., &c." The Magistrate was of opinion that six months was inadequate for the offence, if the appellant was guilty; but at the close of the case for the prosecution, having given him the option whether he would be tried summarily or be committed to the Assizes,—and the appellant having elected the former, and the Magistrate himself also deciding to try the case summarily,—the appellant [prisoner] adduced evidence in

his defence. On the conclusion of the evidence, the Magistrate dismissed the charges of extortion, and convicted him on each of the counts for receiving the gratifications, and sentenced the appellant to four months on each of such counts, as before stated,—being twelve months in all. The appellant appealed against this conviction and sentence.

Van Someren for appellant, contended that the Magistrate had sentenced the prisoner for a term in excess of what he was entitled to pass, and referred to sections 5 and 6 of Ordinance 13 of 1872, above set out, and to Ordinance 6 of 1873, section 59; that the Magistrate's idea that as long as in each count he kept within six months, and that the total term of imprisonment imposed was immaterial, whether it exceeded six months or not,— was quite unprecedented, and against the spirit of the sections of the Ordinances. The Magistrate's jurisdiction, being the creature of a Statute, and in derogation of the Common Law, which gave every man the right to be tried by a Jury, could not be extended without express words. The consent of the prisoner to be tried summarily was quite immaterial, as he could consent to nothing, and no consent gave jurisdiction, where otherwise there was none. *Reg.* v. *Bertrand*, 1 L. R. P. C. 520.

Ross [*acting Solicitor-General*] for respondents, contended that the Magistrate had jurisdiction, as by section 5, clause 2, above set out, he was empowered to inflict the imprisonment "applicable by law to the offence;" and by law, each of the offences of receiving a gratification, was liable to be punished for any term not exceeding six months if tried by a Magistrate; that the Magistrate had kept within the six months in each count, and the prisoner was liable to be tried for, and convicted of three distinct offences at one time. The case was complete against prisoner in each count, and such offence could be dealt with separately, so long as the Magistrate did not, in each, exceed six months. He referred to *Reg.* v. *Castro*, 6 L. R. App. C. 229, as in point.

Van Someren in reply, contended that *Regina* v. *Castro* was distinguishable,—as there, unless the section could be cumulative, the prisoner would have got scot free of the second assignment of perjury of which he was convicted, as the case was tried by the Superior Court sitting in *Banc*: there would have been a miscarriage of justice unless it was so,—or else the prisoner should not have been tried at one time on both counts, but must undergo two distinct trials. Here, however, such reasoning wholly failed, as, although the Magistrate might be deprived of his jurisdiction, this Court could try the case, with the help of a Jury, in the usual way, and pass a sentence beyond six months.

Wood, J. *Regina* v. *Castro*, has no bearing on this question, as the legality of this sentence is to be decided by section 5, clause 2, of the Summary Jurisdiction Ordinance 1872, and on that point, I am of opinion that the Magistrate should not have pronounced the sentence, if, in his judgment, the case could not be adequately dealt with by imprisonment for six months. In my judgment, and according to the popular meaning of the word, the "*case*" against the prisoner was one, though the charges were

WOOD, J. 1884.

KADER KHAN v. HO FUK WENG & ORS.

three-fold under section 59 of Ordinance 6 of 1873. The discretion given by section 5, clause 2, to the Magistrate, is in effect and in spirit, that graver cases, involving serious punishment, should be tried by the Supreme Court and a Jury, and that whatever may be the result, where the Magistrate hears and determines three cases one by one, and arrives at a separate conclusion in each, though he had the power under section 59 of the Ordinance of 1873, to try them together. On this latter point, I give no decision.

In this case, where the charge was one, the hearing one, and the decision one, after hearing the entire of the three charges,—I am of opinion that the Magistrate exceeded his power of sentence from the moment that he thought, as no doubt he did think, that the "case" could not be adequately dealt with by imprisonment for six months. I consider that the sentence passed on the accused, is one which cannot legally be passed for the offences of which he had been convicted, and I accordingly annul the sentence; but inasmuch as it is obvious that the whole case consisting of three charges, did, in the opinion of the Magistrate, warrant a heavier sentence than six months, I shall send back the case to him with directions to commit the prisoner to trial at the Assizes. Upon the enquiry before the Magistrate, it is clear that on the termination of the case for the prosecution, the Magistrate gave to the prisoner, the option of having the case tried summarily or having it sent up to the Court of Assize. The prisoner having elected to be tried summarily, the evidence of his witnesses was then taken. Under such circumstances, I am not able to treat the depositions before the Magistrate with a view to a summary conviction, as altogether the same as the depositions taken with a view to a preliminary enquiry. I shall therefore direct that the depositions in the case to be sent up to the Supreme Court, shall be the depositions before the Magistrate, but only up to the time of the option being given. I may add, that the giving of this option to the prisoner, as to whether the case should be treated summarily or not, was irregular, and so far improper: the duty is thrown upon the Magistrate to decide on such a point in the interests of justice generally, and not to leave any such matter, or, indeed any matter in a criminal enquiry, to the option of any prisoner.

Order accordingly. [*a*]

REGINA *v.* ABASS & ANOR.

PENANG.

WOOD, J. 1884.

Sept. 15.

The mere possession of instruments for gaming, is not punishable under the Gaming Ordinance 13 of 1879.

The appellants Abass and Majid, were severally convicted by A. M. McGregor, Esq., acting Magistrate, for assisting in the business of a common gaming house, to wit: by having in their

[*a*] See *Regina* v. *Kader Khan*, Criminal Rulings, Vol. II. of these Reports, p. 113.

possession a ticket connected with a Wah-Weh lottery, under section 2, clause 4 of Ordinance 13 of 1879, and were severally sentenced to two months' rigorous imprisonment.

From the evidence, it appeared that the respondents were detectives, and on the 4th August, in consequence of information received, they proceeded to a compound close to Macalister Road, where they waited, and at 12-30 p.m., they saw No. 1 appellant coming out of the compound, and No. 2 in the act of entering. The respondents immediately arrested the two men, and on searching them, found on No. 1 a Wah-Weh ticket, $1 in silver, 7½ cents in copper, and a pencil; and on No. 2 a similar ticket, $1 in silver and 2 cents in copper. It was shewn that tickets like the ones in question, were generally kept by persons collecting money for lotteries, and who received commission thereon. The first appellant in his defence, stated that the ticket had been picked up by him on the road, and had been taken from him by the detectives; No. 2 stated that he had the ticket merely for the purpose of making friends with chinese Wah-Weh gamblers, and thereafter informing against them,—having been asked to do so by another detective named Hat. No evidence was adduced in corroboration of these statements.

The clause of section 2, under which the appellants were convicted, is as follows:

"Whoever being the owner or occupier of a place kept or used for the purpose of carrying on the business of a common gaming house, or acting on behalf of the owner or occupier thereof, or having the care or management of, or in any manner assisting in the business thereof, receives, directly or indirectly, any money, security or chattel for or in respect of any event or contingency connected with any game or lottery, or sells or offers for sale, or gives or delivers, any paper writing, figure, symbol, or other thing of any kind, which either expressly or tacitly entitles, or purports to entitle the recipient or bearer, or other person, to receive any money, security or chattel, on any such event or contingency as aforesaid, shall be punishable, &c."

The appellants having been convicted as aforesaid, now appealed, under the provisions of the Appeals Ordinance 12 of 1879.

Capel for appellants.

Ross [*acting Solicitor-General*] for the Crown.

Wood, J. The evidence merely shews that the appellants were in possession of lottery tickets,—but simple possession of an instrument for gaming, is no where punishable under Ordinance 13 of 1879. Clause 4 of section 2 requires more than the mere possession of such instruments. There being no evidence to support the charge, the convictions must be quashed.

Convictions quashed.

MAHOMED SHAM *v.* KOMORAPAH CHETTY.

PENANG.
WOOD, J.
1884.
October 22.

A mortgagor who does not redeem his mortgage on its due date, but permits the same to run on, and continues paying interest thereon, and who thereafter on notifying to the mortgagee his intention to redeem forthwith, is told that he will not be permitted to do so, except on payment of certain months further interest in lieu of notice, and who thereupon, but only in order to get back his Deeds and complete a sale he had arranged for, pays to the mortgagee the whole amount of principal and interest due, and also the further interest demanded by him—is not entitled afterwards to recover back the amount paid for such further interest, as money paid under duress, or by mistake, or as money had and received.

Query. Has a mortgagee in this Colony, whose mortgage is allowed by the mortgagor to run over its due date, by law or custom, the right to a notice from the mortgagor, of his subsequent intention to redeem, or to charge further interest in lieu of such notice; and if so, for what period? Is the practice in England of a six months' notice of an intended redemption, on six months' interest in lieu thereof, applicable here?

Van Someren on behalf of the defendant, Komorapah Chetty, had, on a former day, obtained a Rule to bring up the proceedings in this case, which was tried before H. A. Thompson, Esq., Commissioner of the Court of Requests, and calling on the plaintiff and the Commissioner, to shew cause why the judgment of that Court should not be reversed, or a new trial granted, under section 10 of the Appeals Ordinance 12 of 1879. From the affidavit of the defendant's agent, on which the rule had been granted, and which was not attempted to be contradicted by the plaintiff, and was supported by the Commissioner's minute made at the trial before him, it appeared that on the 15th October, 1881, the plaintiff, who was then the owner of certain lands and hereditaments at Rope Walk Lane in Penang, mortgaged the same to the defendant to secure the repayment of a loan of $2,000, and interest at 12 per cent. per annum, within one year from such date; that the plaintiff did not redeem the mortgage at the end of the year, but continued paying the defendant interest as before, up to 15th August, 1884; that on the 10th September, the plaintiff having agreed with one Tuan Mahomed for the sale of the property to him, came to the defendant without any previous notice, and demanded to redeem his mortgage forthwith, on paying him the full amount of principal and interest up to that date, and then tendered this sum to the defendant; that the defendant declined to accept the amount, saying that as it was beyond the due date, he wanted three months further interest from 15th September [the end of the then current month], in lieu of three months' notice; that the plaintiff declined to pay this, and thereupon the plaintiff, the defendant's agent, the said Tuan Mahomed, and other mutual friends of the parties, consulted Counsel on the subject, and were told that the defendant, as mortgagee, was entitled to further interest in lieu of notice, and probably for the full three months, as that was usually the period charged for here; that the parties then left, and through the intervention of the said Tuan Mahomed and others, it was arranged that the defendant should have his full month's interest for the then current month, and a month's further interest in lieu of notice. The plaintiff appeared unwilling even to do this, but

being obliged to complete his sale of the property to Tuan Mahomed by that date, and requiring for that purpose his title Deeds without delay, he paid the defendant the full amount of principal and interest up to that date, and the further month's interest, as well as for the extra few days, to complete the current month; that the defendant accepted this in settlement of all claims on the mortgage, and thereupon gave up to the plaintiff his title Deeds; that the plaintiff on getting his title Deeds, completed his sale of the property to Tuan Mahomed, and on the 18th September, issued a summons against the defendant, for the recovery of the amount paid for the further month's interest, and the interest of the extra days to complete the then preceding current month, amounting to $23.33; that the summons was served on the defendant on the 19th instant, just as he was about embarking for the Coast, and by him was handed to his agent the deponent, with instructions to defend the action; that the case was heard before the said Commissioner on the 9th October following, when the defendant's agent appeared for the defendant, and had also his witnesses, the said Tuan Mahomed and others, in attendance on subpœnas; that the Commissioner, after hearing the evidence of the plaintiff, which he noted down just shortly, called on the defendant's agent for his defence; that the defendant's agent then made a statement which was not on oath, and which the Commissioner noted down as follows: "Chetty admits "that the plaintiff paid him one month's interest too much, but "that he agreed to do so, because he was giving up the bond— "gives as a reason the rate of interest is higher now than it was"; that the Commissioner then gave judgment for the plaintiff for the full amount claimed and costs; that the defendant's agent informed the Commissioner that he had witnesses in attendance who could prove the facts, but was told that their evidence was quite immaterial and unnecessary, as he [the Commissioner] having the evidence of the plaintiff, and the statement of the defendant's agent, he was of opinion that the defendant had no right in law to interest beyond the date the Deeds were redeemed, and was bound to refund the plaintiff the extra month and five days' interest; that judgment was accordingly entered up for the plaintiff for the full sum of $23.30, and costs, and that this amount, with costs, had been paid into Court by the defendant's agent, with a notice to withhold same from plaintiff, and to abide the present application to this Court. The Rule was thereafter in due course applied for and obtained, and this day came on for hearing before the Court.

Mr. *Thompson*, the Commissioner of the Court of Requests, appeared in person, and shewed cause. He stated, that being of opinion that the defendant improperly refused to give up the bond and title Deeds, unless he was paid a month's interest in lieu of notice, he considered the plaintiff was entitled to a refund of the amount; that the plaintiff had immediate need of his title Deeds to complete the sale, and but for that fact, which the defendant took advantage of, would not have paid the defendant any extra interest.

WOOD, J. 1884.

MAHOMED SHAM v. KOMORAPAH CHETTY.

The Plaintiff [in person] also shewed cause, reiterating the facts of the case, and complaining of the great hardship on him to pay further interest, when he had never agreed, by his bond, to do so.

Van Someren in support of the Rule, contended that the defendant, as mortgagee of an overdue mortgage bond, was entitled to reasonable notice of an intention on the mortgagee's part to redeem, or to payment of interest for a corresponding period; that three months was the usual period charged for among European money-lenders in this Settlement, and was a reasonable period; that it was but reasonable the mortgagee should have such notice, or the interest in lieu of it, so as to give him time to look out for a new investment in the interval, in case the notice is given,—or to be recouped any loss of an immediate investment, by payment of the further interest, where such notice had not been given. He referred to *Prideaux on Convey.*, 449, [8th ed.]; *Day* v. *Day*, 31 Beav. 270, s. c. 31 L. J. [N.S.] 806, and *Brown* v. *Cole*, 14 Sim. 427, s. c. 14 L. J. [N.S.] Ch. 167. He also contended that there was no duress; that if the mortgagee had not the right he claimed, it was only a mistake of law on the part of the mortgagor, and the money could not be recovered back, but that the real fact was, there was no mistake, but a fair and final settlement, by mutual friends, of all claims, and the plaintiff was merely attempting to steal a judgment, thinking, the defendant having left for the Coast, he would not trouble himself to defend the suit; that a new trial was unnecessary as the Court had before it all the facts of the case, but on such facts and the law, the judgment of the Court of Requests should be reversed with costs.

Wood, J. I do not intend pronouncing an opinion on the main question as to whether a mortgagee has a right, either by law, or the practice in this Settlement, to further interest in lieu of notice. It may be that as the interest is usually payable monthly, a month's notice or a month's interest would be reasonable, but it is quite unnecessary to express an opinion on the point. On the facts as they appear in this particular case, in the affidavit of the defendant's agent, which facts are not denied, it is clear that this money, once having been paid by the plaintiff,—whether under a mistake of law, or in pursuance of a fair and amicable arrangement,—is not recoverable by him from the defendant, according to the well-known case of *Marriott* v. *Hampton*, 2 Sm. L. C. 356 [5th ed.]. In view of the law, as laid down in that case, and of the general law of this Colony on the subject, I must reverse the judgment of the Court of Requests, and direct the money paid into that Court by the defendant to be paid out to him. The plaintiff will have to pay the costs of this application.

Judgment reversed.

ONG HONG JIOW *v.* TEH TAN KIAT.

PENANG.

WOOD, J.

1884.

November 10.

A labour contract made under the provisions of an Ordinance, is not put an end to, by a subsequent repeal of that Ordinance; but [provided the repealing Ordinance does not re-enact the penalties], the Statutory incidents only,—[such as dealing with breaches of the contract criminally],—are done away with.

Section 10 of the Labour Contract Ordinance 1 of 1882, includes cases of contracts for labour,—breaches of which, prior thereto, were not punishable criminally; provided there is no express provision in the contract itself, to the contrary.

The absenting from service by a laborer, is a continuing breach, and an "offence" committed *de die in diem*; and may so be dealt with.

Where therefore a laborer contracted under Ordinance 2 of 1877, to serve his master for a certain number of days, but before the time was out, absconded from the Estate and was never seen again until arrested in October 1884—but in the interval, the Ordinance of 1877 was repealed by Ordinance 4 of 1880, which did not re-enact penalties for breaches of Contract—and by Ordinance 1 of 1882, which became law in February, 1884, all contracts for service made prior to that Ordinance, were to be considered in force after the passing of that Ordinance, and subject to the liabilities of that Ordinance, whereby criminal liability for breaches of labour contracts was restored [although between 1880 and 1882 there had been a suspension of such liabilities]—and the laborer having been arrested in 1884, was charged before the Magistrate with absenting,—

Held, 1*st*, the contract for service was still a subsisting one; 2*nd*, that it was a contract for service within section 10 of the Ordinance of 1832, and that breaches thereof were liable to be dealt with criminally; 3*rd*, that the absence of the laborer was a continuing breach, and an offence *de die in diem*, and so punishable under that Ordinance, as amended by Ordinance 3 of 1883.

This was an appeal from a decision of W. Egerton, Esq., Magistrate at Bukit Tambun, dismissing the charge preferred by the above-named appellant, the owner of a plantation in Province Wellesley, against the respondent, a late laborer on his Estate. The respondent, the laborer, was charged for that he, "having "received an advance in money and agreed to serve the said Ong "Hong Jiow for 360 days as a laborer, did, on the 16th day of "August, 1880, abscond from the service of the said Ong Hong "Jiow at Bukit Tambun in Province Wellesley, and thereby com-"mitted an offence punishable under section 2, clause 5, of the "Labour Contracts Amendment Ordinance 3 of 1883." On the case being tried before the Magistrate, the complainant [appellant] produced the defendant's [respondent] contract of service, which was dated 24th April, 1880. The defendant was shewn to have absented himself from the Estate on 16th August, and was never again seen until he was arrested on the 2nd October, 1884. The Magistrate, without going into further evidence, dismissed the charge, holding the laborer could not be punished, by reason of subsequent legislation on the subject of Labour Contracts. The complainant [the master] appealed against this decision, and in the case stated by the Magistrate, he stated his reasons for dismissing the case, as follows:

"The following adjudication was made. Contract entered into on 24th April, 1880. Defendant charged with absconding on 16th August, 1880. The Contract was made under the provisions of Ordinance 2 of 1877. This Ordinance was repealed on 13th July, 1880, by Ordinance 4 of 1880, which was itself repealed by Ordinance 1 of 1882. Therefore I held, that the defendant could not be prosecuted under Ordinance 1 of 1882, as he was not engaged under it. Nor under Ordinance 4 of 1880 for same reasons. Nor under

WOOD, J. 1884.

ONG HONG JIOW v. TEH TAN KIAT.

Ordinance 2 of 1877, as that Ordinance was repealed unconditionally. The defendant was therefore discharged."

On the appeal now coming on for hearing,

Van Someren for appellant contended, that the questions here were, *1stly*, Whether the Contract made under the provisions of Ordinance 2 of 1877, but not fulfilled, was valid now that that Ordinance had been repealed; and *2ndly*, if valid, Whether the Magistrate could have punished the laborer in October, 1884, under the provisions of Ordinance 1 of 1882, as amended by Ordinance 3 of 1883. He pointed out that certain of the statements of the Magistrate in his reasons for dismissing the charge, were incorrect in point of fact. The Magistrate said Ordinance 2 of 1877 was repealed on 13th July, 1880, by Ordinance 4 of 1880, but in truth Ordinance 4 of 1880, only came into operation on 1st April 1881, [*Government Gazette*, 1881, p. 30], and the Ordinance 2 of 1877 was in force till that date: the Magistrate also said Ordinance 4 of 1880 was repealed by Ordinance 1 of 1882, but there was no such repeal, and Ordinance 4 of 1880 was still in force. Ordinance 4 of 1880 provided only for appointment of officers, &c., and not for contracts, and punishments for breaches of contract. Ordinance 1 of 1882 on the other hand, provided for these, and had been amended by Ordinance 3 of 1883. Having cleared these points, he submitted that the contract was not rendered void by the repeal of the Ordinance of 1877, but the Statutory incidents only, were done away with, and it was no longer possible for a Magistrate to convict or punish under that Ordinance—but as Ordinance 4 of 1880 did not reenact the penalties, it would be contended for the Magistrate that even if the first point was conceded, still that as there was a suspension of liability to criminal proceedings from 1st April, 1881, [the date Ordinance 4 of 1880 came into operation] to the 28th February, 1882 [the date Ordinance 1 of 1882 became law], there could not now be any criminal liability on the part of the laborer; that that brought forward the second question, and as to that he submitted section 10 of Ordinance 1 of 1882 [a section the Magistrate appeared to have overlooked] was specially applicable to a case of this kind, and a liability to criminal proceedings,—and that under that very Ordinance,—was restored. It was possible however, that it would be said that there had been no breach since the Ordinance 1 of 1882 became law, but as to that, the absenting was a continuing breach, and every day's absence was a distinct "absenting" and an offence. *Ex-parte* Baker, 7 E. & B. 697, 26 L. J. M. C. 155, s.c. 2 H. & N. 219; *Regina* v. *Willans*, Straits Law Reports 66, 92, 93. [*a*] The word "absconding" in the charge was a clerical error for "absenting," as would be seen from section 2, clause 5, Ordinance 3 of 1883 to which it expressly referred, and also as "absconding" was not an offence, nor was punishable [section 13, Ord. 4 of 1880; ss. 13, 16, 27 of Ord. 1 of 1882]. The Magistrate ought under section 11, clause 2, of Ordinance 1 of 1882, to have amended the charge, by changing

[*a*] Suprà p. 16.

the word "absconding" to "absenting," and inserting after the figures "1880," the words "and thence continuously from day to day till the 2nd day of October, 1884." At all events, the Magistrate did not dismiss the case because the charge was for "absconding," but treated the case, as his reasons,—[read in conjunction with the Section, Clause and Ordinance referred to in the charge],—might justly imply, as an ordinary case of "absenting," and this Court, under section 32 of the Appeals Ordinance 12 of 1879, would amend it, so as to deal with the real question in the case.

Ross [*acting Solicitor-General*] for the Magistrate, conceded that the contract was not rendered void by reason of the repeal of the Ordinance of 1877, but that the penal liabilities thereunder were alone done away with. He contended, the question here was, whether the absenting after the date of Ordinance 1 of 1882, was an offence under the provisions of that Ordinance; that between the repeal of the Ordinance of 1877 on the 14th April, 1881, and the 28th February, 1882, when Ordinance 1 of 1882 became law, there was no such thing as punishing criminally for breach of contract by Chinese laborers. Then section 10 of Ordinance 1 of 1882, did not help the appellant, as it could only apply to contracts, not only in force on the 28th February, 1882, but contracts the breach of which would be an "offence," and punishable criminally. If section 10 was held applicable to this case, it would make all persons in the relationship of master and servant, liable to penalties for breach of contract, as the words were, "*All* contracts for service in force at the coming into operation of this Ordinance"—but that could not be its meaning. It meant something less extensive, and if so, it should be limited to contracts, breaches of which were "offences"—or in other words, contracts having criminal penalties attachable thereto. The present case did not fall within that class, by reason of the laborer being exempt from criminal consequences between the dates named. If the words "all contracts for service" were to have this more extensive meaning, why limit them only to agricultural contracts, why not apply them to domestic servants as well? He further contended, that what was formerly not criminally punishable, should not be so made by *ex post facto* legislation, as section 10 in effect was. The contention on the other side also gave no meaning to the words "subject to the express provisions in any such contract." The contract here was, on 28th February, 1882, not a contract subject to penalties, and the words "express provisions" do not necessarily mean expressed in writing, as Ordinance 1 of 1882 applied to verbal as well as to written contracts. If there had not been the interregnum, the contention of the appellant might have been upheld, but with that fact before the Court, it could not extend section 10 to include such a case as this, and therefore the laborer could not be punished, and the Magistrate was right in dismissing the charge. He also contended that the offence was committed before Ordinance 1 of 1882 was passed, and so could not be adjudicated on under that Ordinance. *Maxwell*

WOOD, J. 1884.

ONG HONG JIOW v. TEH TAN KIAT.

on Statutes, 377 *et seq.* The breach was not a continuing breach, and there was no offence "*de die in diem.*" The cases referred to did not bear out the appellant's contention on this point; they did not go far enough for him, and were distinguishable from the present. In both cases referred to, there was a conviction, and a distinct second absenting—and all that Lord Campbell in *ex-parte* Baker said was, "A fresh offence was committed when the "prisoner, *after being liberated from imprisonment*, did not return, "to the service, because the contract continued, and he absented "himself." Here it is all one absenting from 16th August, 1880 to 2nd October, 1884; there was no break in it, or a second refusal to return to work, and therefore there was but one offence.

Van Someren, in reply, contended the words of section 10 were large enough to include this case, and being a remedial or saving clause, should be construed liberally. There was no "express provision" in this contract to prevent the operation of the section in this case. The *ratio decidendi* in *ex-parte* Baker was, that each day the labourer omitted to return to work was a distinct absenting; and even if what occurred here was all one offence, such portion of it as was after February, 1882, was punishable under the Ordinance of that year, as amended by the Ordinance of 1883.

Cur. Adv. Vult.

18th February, 1885. *Wood*, J. This was an appeal from the decision of the Magistrate, under the following circumstances: Teh Tan Kiat, a coolie, by contract dated 24th April, 1880, agreed to serve Ong Hong Jiow for 360 days, as a labourer, and on the 16th August following, "absconded" from the service of Ong Hong Jiow and was accordingly charged with so doing. The Magistrate was of opinion that the prisoner could not be prosecuted for such absconding and dismissed the case, and in his statement of the particulars of the case, gives his reasons as follows: "The contract was made under the provisions of Ordinance "2 of 1877. This was repealed on 13th July, 1880, by Ordinance "4 of 1880, which was itself repealed by Ordinance 1 of 1882. "Therefore I hold, that the defendant cannot be prosecuted under "Ordinance 1 of 1882, as he was not engaged under it—nor under "Ordinance 3 of 1880 for same reason—nor under Ordinance 2 of "1877 as that Ordinance was repealed unconditionally." The appellant [the master] now appeals against the decision of the Magistrate, and Mr. Van Someren on his behalf has contended 1st, that the contract, though made under the Ordinance of 1877, was still in force, and was not put an end to by the repeal of that Ordinance, but such repeal did away only with the Statutory incidents given to the contract by that Ordinance, and 2ndly, that if the contract was still a subsisting contract, the Magistrate could have punished the labourer under the provisions of the Ordinances of 1882 and 1883. The acting Solicitor-General conceded the first point, and I think properly so. It is erroneous to suppose that the contract was repealed along with the Ordinance of 1877, unless

there are explicit terms in the Ordinance of 1882 to effect that purpose. The second point remained to be decided; and on this, section 10 of Ordinance 1 of 1882, was relied on. The section is as follows: "All contracts for service in force at the coming into "operation of this Ordinance, shall continue to be in force after "the passing of this Ordinance, and subject to the express pro- "visions in any such contract, the parties thereto shall be subject "to, and entitled to the benefits of the provisions of this Ordi- "nance." By section 11, it is provided that "whenever under any "contract of service in writing under this Ordinance . . . . . "the labourer . . . . . shall absent himself from his service, the "party feeling aggrieved may make a complaint," and so forth. By section 14, sub-section 5 [as amended] "if the complaint relates "in the case of parties bound by a written contract of service, to "neglect or omission on the part of the party complained against, "without reasonable excuse to fulfil the contract of service . . . . . "or if the labourer shall without reasonable excuse, to be allow- "ed by the Magistrate, absent himself from his employer's service, "the Magistrate may, &c.,"—then follows the punishment or penalty to be inflicted by the Magistrate. In this case the complaint arises on a written contract of service which is now existing, and in view of the language of section 10 of the Ordinance of 1882, it was contended it must be held to be a contract under the Ordinance, seeing that contracts "in force at the coming into "operation of this Ordinance," shall continue to be in force after the "passing of the Ordinance," and shall be "subject to the "provisions of the Ordinance." It is thus expressly declared by section 10, that contracts for service in force at the time of the coming into operation of the Ordinance, shall continue in force. I think I cannot but therefore hold that this is a "contract of "service in writing under this Ordinance" within the meaning of section 14. And thus the only question which remains is, is the breach of contract, in absenting himself, a continuing breach? *Ex-parte* Baker, 7 E. & B. 697, and the remarks of Sir Benson Maxwell in *Regina* v. *Willans*, Straits Settlements Cases, 92, 93, [*a*] were referred to as decisions in point. The Acting Solicitor-General contended that the question had not arisen since the passing of the Ordinance of 1882, and that this was not the case of a continuing breach. I observe that the case states that the coolie was charged with "absconding," but the argument was based on the broader ground of the charge being one of "absenting himself from the service," and I entertain no doubt of the soundness of the contention on the part of the appellant, that the Magistrate should have dealt with this "absenting from the ser- "vice," and that the absenting himself from service is a continuing breach, upon which the Magistrate had ample jurisdiction to adjudicate. The appeal will be allowed with costs.

[*a*] *Suprà*, p. 16.

REGINA *v.* KELLY & ANOR.

PENANG.

WOOD, J.
1884.

Dec. 22.

A person who is *de facto* a Police Constable [whether he be under a formal engagement to serve as such or not] is liable to be punished under section 26 of the Police Force Ordinance 1 of 1872, if he commits any of the offences enumerated in that section.

Semble. Where there is no time specified by an order of the Governor, under section 1 of Ordinance 9 of 1881, for the term to be named in a Contract of a Constable, a Contract made under that Ordinance is void, if it be for a term of five years [*a*].

This was an appeal from a conviction by the first Magistrate of Penang, C. W. S. Kynnersley, Esq., but on the appeal being this day argued before the Superior Court, it was ordered under section 45 of the Appeals Ordinance 12 of 1879, that it should be heard before the Court of Appeal. The appellants, Kelly and Brooks, were Constables in the Police Force, stationed at Penang, and had entered into a contract to serve as such for a period of five years. Before such term had expired, they deserted the force, and were found on board a vessel in the harbour, about leaving for Europe. They were arrested and charged before the Magistrate with desertion, under section 15 of the Police Force Ordinance 1 of 1872, but that Ordinance having been amended by Ordinance 9 of 1881, the charge had to be withdrawn. By section 15 of the Police Ordinance of 1872, the Contract of a Constable was not to exceed three years; by the Ordinance of 1881, section 1, the term of the contract was to be for such a time as might be ordered by the Governor. No such order had been passed, and the appellant's contract, in the usual course, was made for five years as stated. On withdrawal of the charge of desertion, the appellants were again charged, but with disobedience of orders and neglect of duty under section 26 of the Ordinance of 1872. Section 18 of the latter Ordinance, is as follows:

"..... Every .... Constable who ..... shall hereafter enter the Police Force without formal engagement, if not engaged or re-engaged for a term of years, shall be held to be under engagement to the Government to serve in the Police Force, from month to month, every such engagement after the first month's service being held to commence on the first and to be determinable on the last day of each successive month; and any such ..... Constable aforesaid, shall not be entitled, without written permission from the Inspector-General or Chief Police Officer to withdraw from the duties of the Police Force, unless at least one month previously to such withdrawal he shall have given notice thereof in writing to the Inspector-General or Chief Police Officer. Every ..... Constable offending against the provision in this section, shall be liable to a penalty not exceeding fifty dollars, or to imprisonment not exceeding three months, and all arrears of pay due to him at the time shall be forfeited."

2nd March, 1885. The appeal now came on to be heard before the full Court of Appeal consisting of *Sidgreaves*, C. J., *Ford* and *Wood*, J. J.

Thomas [E. W. *Presgrave* with him] for appellants, contended

[*a*] See now Ord. XI. of 1885, and Orders in Council thereunder, dated 12th June and 15th September, 1885, G. G. p.p. 1046 & 1418.

SIDGREAVES, C. J. FORD, & WOOD, JJ. 1884.

REGINA v. KELLY & ANOR.

that the contract under which the Constables served, was illegal, as being more than three years and not for a term named by the Governor; that it was for the Crown to shew there was such an order, and that the contract here was within its provisions. It was for them to shew everything that went to give validity to the contract, and was a negative not peculiarly within the knowledge of the prisoners; that section 18 did not help the prosecution as the prisoners could not be brought under that Ordinance, except by operation of section 12 of the Ordinance of 1881, but that section only applied to persons engaged under that Ordinance, which the prisoners had not been, their contract being otherwise than that provided by that Ordinance. Section 18 did not help also, as it only applied to cases without "formal" contracts, and without an agreement for a "term of years"—here there was such an agreement, and an agreement, though void in law, was yet perfectly formal as regards its execution, &c. It was also contended, that the act of the prisoners amounted to a desertion, and it was improper to convict of a lesser crime, the neglect of duty, simply because there was no punishment for desertion in cases of persons not engaged under the Ordinance of 1872; that absence from duty, meant an absence with an intention of returning to duty, and not an absence with no such intention.

Ross [*acting Solicitor-General*] for the Crown, was requested to confine his argument to the first objection taken, *viz.*, the validity of the contract, and effect of section 18. He contended that as the contract was to be for such term as the Governor might name, and the contract was for five years, and signed before the proper authorities, it was *primâ facie* in accordance with such an order: that it was for the prisoner to shew it was otherwise if they could. There was nothing in the Ordinance to prevent Constables making agreements for what term they pleased. Section 18 was conclusive against the prisoners, as if the contract was void, they were without formal engagement—"formal engagement" included a "valid contract," and the expression, without an agreement "for a term of years," did not help the prisoners, as they were really blowing hot and cold. They first said there was no contract, because it was void, then to meet this section they said there is a contract, and therefore we are not within the section. They must take one line of argument or the other—if the contract was void, it is as if there was no contract, and so no agreement for a term of years, and section 18 applied. The prisoners being *de facto* Constables, wearing Constables' uniform, and drawing Constables' pay, was sufficient to bring them within section 26, if they committed any of the offences enumerated therein.

Sidgreaves, C. J. The appellants in this case, were convicted under section 26 of the Police Ordinance 1 of 1872 for disobedience of orders and neglect of duty. It appears to me they must be considered Police Constables, subject to the regulations of the Police Force Ordinance. They *de facto* weresuch, and I consider it is perfectly immaterial whether they were under a formal

SIDGREAVES, C. J. FORD, & WOOD, J.J. 1884.

REGINA v. KELLY & ANOR.

engagement or not. As the conviction appears to be borne out by the evidence, and the Magistrate's decision fairly arrived at, it should, I think, be affirmed.

Ford, J. I concur.

Wood, J. I arrive at the same conclusion. The Magistrate properly dealt with the case, as the appellants were *de facto* Constables, and were absent from duty without good cause. The contract, I am inclined to think, was illegal, and the appellants entered without a formal engagement; but under the combined operation of sections 26 and 18, their service was from month to month. Such service had not been legally terminated at the time the appellants absented themselves, and they were therefore liable.

Conviction affirmed.

END OF VOL. III.

INDEX.

ABETTOR OF MISCHIEF—Advance of money to owner of Estate—mortgage—security - - - - - - - 154

see MISCHIEF. 3.

ABSENCE—Contract—Labour-16, 62, 71, 164, 189

see LABOUR. 1, 2, 3, 6, 7.

——— OF COUNSEL—*see* Counsel - - - - - - - - - 50

ACTS:

1 of 1849 - - - - - - 51

see JURISDICTION. 2.

7 of 1854 - - - - - - 51

see JURISDICTION. 2.

2 of 1855, s. 57 - - - - 79

see EVIDENCE. 2.

13 of 1856 - - - - - - 140

see CONSERVANCY. 3.

——— s. 57 - - - - - 43

see GAMBLING. 1.

14 of 1856, s. 36 - - - 13, 45

see CONSERVANCY. 1, 2.

——— s. 43 - - - - - 140

see CONSERVANCY. 3.

13 of 1859 - - - - - 62, 71

see LABOUR. 2, 3.

14 of 1866, s. 5 - - - - 104

see POST OFFICE. 2.

——— s. 46, cl. 2 - - - - 97

see POST OFFICE. 1.

29 of 1866 - - - - - - 122

see COURT OF REQUESTS. 3.

ADMIRALTY JURISDICTION—

see JURISDICTION. 7. - 152

ADULTERY—Criminal house-trespass—Insult - - - - - - - - 131

see TRESPASS.

ANIMAL—Wounding of, - - 88

see MISCHIEF. 1.

ANIMUS FURANDI—Theft of Government Timber—evidence - - - 143

see THEFT. 2.

ANNOYANCE—Insult—Criminal house-trespass - - - - - - - - 131

see TRESPASS.

see also CLAIM TO PROPERTY. 3. 167

APPEAL—Refusal of Magistrate to adjourn case on ground of absence of Counsel,—no ground for - - - - - 50

see COUNSEL.

2. ——Prosecutor dissatisfied with decision of Magistrate may appeal in the same way as a prisoner might - - - 92

see PROSECUTOR. 1.

3. ——Crown—Costs - - - 99

see LABOUR. 4.

4. ——Smallness of fine - - 108

see MAGISTRATES. 11.

5. ——No appeal lies under the Appeal Ordinance 9 of 1874, from the decision of a Court of two Magistrates, and such proceedings can therefore be brought into this Court only by *Certiorari*. The origin and constitution of the Court of Quarter Sessions, of two Magistrates, and Police Courts, considered. REG. *v.* KUCK SIN LOI - - - - - - - - 110

6. ——Notice of,—Ordinance—Inaccuracy - - - - - - - - 119

see NOTICE OF APPEAL.

7. ——In a Magistrate's appeal under section 18 of the Appeals Ordinance 12 of 1879, the only parties to the appeal are the prosecutor and prisoner, the parties in the Court below. Neither the Crown, nor the Magistrate, is a party thereto; and have no *locus standi* to be heard, as of right, in such appeal. PUNGHULU ALLANG *v.* HIM. 144

APPEAL CASE—Information in an Excise Case and Commitment, no part of,—136

see MAGISTRATE. 16.

ASSAULT—A person who is charged with assault and robbery cannot be simply convicted of the assault. A charge stating an assault to have been "feloniously" made is bad, the word "feloniously" not only being surplusage, but actually converting an assault, which is a misdemeanour, into a felony.—*Semble.* The Statute 24 & 25 Vict. c. 96, does not extend to this Colony. REGINA *v.* MAHOMED OOSMAN & ANOR. 50

——— AND ROBBERY—*see* Assault - - - - - - - - 50

ASSIZES—Conviction of Magistrate quashed—prisoner directed to be retried and committed to,— - - - - - 99

see GRIEVOUS HURT.

ASSIZES—*continued.*

——— It is irregular and improper for a Magistrate, to give a prisoner the option to be tried summarily or be committed to the,—or any option in any criminal matter at all - - - - - - - - 182

see MAGISTRATE. 20.

BAD CHARACTER—Evidence of,—Conviction - - - - - - - - 130

see MAGISTRATE. 15.

BONA FIDE CLAIM TO PROPERTY—*see* claim to Property.

BOOKS—No Warrant will be issued for search of private books of prosecutor, to be evidence for the defence - - 107

see SEARCH WARRANT.

BREACH OF CONTRACT—*see* Labour.

BREACH OF THE PEACE—Before an order can be made under section 61 of Ordinance XIII. of 1872, there must be a full hearing of the complaint. Where a Magistrate only caused the informations sworn in order to procure the warrant, to be read to the informants, in presence of the accused, and thereafter made an order that the accused find security under the aforesaid section,—*Held*, this was no hearing, and the information was quashed with costs. REG. *v.* GOH CHOO - - 106

see also INSULT. 1. - - 90

BREACH OF TRUST.—A prisoner was charged with breach of trust of certain monies entrusted to him by the prosecutor, to remit to China: the prisoner had received the money but omitted to remit it, and gave no account thereof, beyond his own statement it had been remitted. To shew the money had not been received, the Magistrate received in evidence a letter written by the remittee to the prosecutor, stating the non-receipt of the money. The prisoner was convicted,—*Held*, the letter was inadmissible in evidence. Several persons, besides the prosecutor, who had been cheated by the prisoner in the same way, were called on the hearing of the above-named charge, and proved the several frauds practised by prisoner on them,—*Held*, their evidence was not admissible, as proving each, a distinct offence. ONG CHENG YEW *v.* LEONG WEE QUAN - 104

see also Partnership. - - 79

BRITISH INDIA—Natives of,—Immigrant - - - - - - - - 99

see LABOUR. 4.

BRITISH SHIP—*see* Jurisdiction. 7. 152

———SUBJECT—*see* Jurisdiction. 7. - - - - - - - - 152

BUILDING—*see* Conservancy. 1, 2. 13, 45

CASE—Reasonable objection to conviction—Magistrate ordered to state,— - 120

see MAGISTRATE. 12.

——*Tara Duss Bhuttacharje* v. *Bhaloo Sheik* [8 Suth. W. R. 69] not followed - - - - - - - - 71

see LABOUR. 3.

CAUSING HURT—*see* Grievous Hurt - - - - - - - - 99

CHANDOO—Being in possession of illicit chandoo, under the Excise Ordinance 4 of 1870, is a possession with a guilty knowledge. Where it was shewn that the appellant was a brothel-keeper and lived in the brothel—that some illicit chandoo was found in a room of the house, which was occupied by one of the prostitutes, and when it was found, both he and the woman denied they smoked opium, which statement was proved to be false,—*Held*, there was no evidence of guilty knowledge.—*Query*, Was the chandoo at all in the man's "possession," within the meaning of the Ordinance.—ONG AH HUAT *v.* OPIUM FARMER. - - - - - - - - 100

2. ——Before a person can be convicted of "knowingly being in possession of illicit chandoo," it must be shewn affirmatively, by direct and reasonable evidence, that the place where the chandoo was found, was occupied by him, so that the things, in such place, must be under his control or custody. Therefore, where it was shewn that certain chandoo was found hidden away in a room in which the prisoner was found at the time of the search, but it was not shewn that he was the occupier of the room, but merely had access thereunto along with many others,—*Held*, there was not that direct and reasonable evidence of the chandoo being in his control or custody, and the conviction was quashed. An illegal entry into a house, in search of illicit chandoo, although it might be the subject of an action, does not make the finding of any chandoo illegal, and so as to render the "possession" of such chandoo, no offence. TEK WEE *v.* OPIUM FARMER - - - - - - - - 132

3. ——The appellant having obtained a permit for conveying two chests of opium by certain specified boats to Kulim, in the Malayan territory, proceeded with the chests in such boats up to the mouth of the Kulim river. On arrival at the Kulim river, he found there was not sufficient water to permit of these boats going up it: he accordingly engaged smaller boats, but these were too small to take in a single whole chest. The appellant accordingly, with the view of carrying on the transit of the opium to Kulim, in these latter boats,

CHANDOO—*continued.*
and without any fraudulent motive, broke bulk, placed the 80 balls of each chest into a gunny bag, and put them in the two smaller boats,—*Held*, he had committed an offence under section 5 of the Excise Ordinance 4 of 1870, as amended by section 1 of Ordinance 6 of 1879. The forfeiture of illicit or contraband articles, on conviction of the offender, is imperative on Magistrates. LOW CHU *v.* OPIUM FARMER. 156

4. ——Where chandoo is not found in the actual occupation of the prisoner, and there is any ground for supposing that the place in which it is found, is not in his usual occupation,—fair evidence should be adduced by the prosecution to shew, that he had some sort of occupation of that place, in order to make the actual occupier's occupation, the occupation of the prisoner. TAN SIM TEE *v.* OPIUM FARMER - 174

5. ——A Magistrate has no power under the Excise Ordinances 4 of 1870, 6 of 1879 or 4 of 1884, to order the forfeiture of a ship, on board of which illicit chandoo is found,—*Semble.* This Court is the proper tribunal for making such order. *In re* S. S. CHI YUEN - - - - - 176

CHARGE—A charge under one Section of an Act followed by a conviction under a different section of another Act, is bad - - - - - - - - 98

see GAMBLING. 3.

——— No offence stated in,—in point of law—conviction quashed notwithstanding plea of guilt - - - - - - 140

see CONSERVANCY. 3.

——— When more than one,—power of Magistrate—cumulative term - - 182

see MAGISTRATE. 20.

CHARTER OF 1826—"Debt, Duty or matter in dispute"- - - - - - 1

see COURT OF REQUESTS. 1.

CHEATING—Conviction for,—theft—evidence - - - - - - 117

see THEFT. 1.

CHEQUE—*see* Immoveable Property. 86

CLAIM TO PROPERTY—Where there is a *bonâ fide* claim to property, the subject-matter of the charge, no conviction for a criminal offence in respect thereto, ought to be made. Therefore, where it appeared that the congregation of a Hindoo Temple was divided in the election of a trustee, and each party appointed the person chosen by them, and one of such parties resolved to repair the temple, and their trustee thereupon directed the repairs to be done, in the course of which a wall of the temple

CLAIM TO PROPERTY—*continued.*
was pulled down,—*Held* no criminal offence had been committed. Under such circumstances, the Court on appeal, quashed the conviction as regarded the fine imposed on the prisoner, but upheld the further order of the Magistrate by which he directed the prisoner to be bound down to keep the peace and also refused the appellant his costs. DOREHSAWMY PILLAY *v.* ARNASHELLAM PATTEN - - - 105

2. —— A claim set up by a prisoner to property which is alleged to be stolen or criminally misappropriated, does not oust a Magistrate of his jurisdiction, unless the claim be *bonâ fide* raised. Where, from the case as sent up, it was doubtful whether a witness, the wife of the prisoner, was called for the prosecution or defence; and on appeal, the prisoner alleged she was called by the prosecutor, and the prosecutor alleged she was called by the prisoner, and the Magistrate had no recollection on the point, but subsequently believed she was called by the prisoner, and then, for the first time, in a foot-note to the case, stated she "was called for the defence"—both prosecutor and prisoner being prepared to file affidavits by themselves and others in support of their respective allegations,—*Held*, as the evidence of the wife, if called by the prosecutor, would clearly be inadmissible, and her evidence was of a material kind, that the conviction ought to be set aside, and the prisoner tried afresh. MAT ISSAH *v.* MAS ETAH - - 134

3. —— The entry and taking possession of property under the *bonâ fide* belief of a right thereto, and in assertion of such right, although accompanied by high-handed acts, which insult or annoy the person in possession,—provided such acts are merely incidents to the assertion of title, and not done with the primary intention of insulting or annoying,—do not make a person liable to be convicted under sections 441 & 447 of the Penal Code. MAT SALLEH *v.* SARAH - - - - - - 167

CLUB—Observations on games played at,—*see* Gambling. 2. - - - - 94

COLLECTOR OF LAND REVENUE—Survey of land in dispute—powers—costs

see LANDMARKS.

COMMON GAMING HOUSE—*see* Gambling.

———OBJECT—*see* Rioting - 61

see also UNLAWFUL ASSEMBLY. 1. - - - - - 89

COMPENSATION—Negligence—Pledge - - - - - - - 161

see PAWNBROKER. 3.

CONJUGAL DOMICILE—*see* Married Woman. 2 - - - - - - 126

CONSERVANCY—Section 36 of the Conservancy Act XIV. of 1856, has no application to the case of a house erected before that Act was passed, but the roof of which is renewed with inflammable materials, subsequently to that Act coming into operation. REGINA *v.* MEERA LEBBY - - 13

2. ——The roof or external wall, of a house built before the coming into operation of Act XIV. of 1856 and which is not contiguous to or adjoining any other building, cannot be compulsorily removed: and the fact that such roof is removed subsequently to the Act being law, makes no difference. A detached hut or building in existence before that Act, may therefore not only stand, but be repaired from time to time, provided such repairs do not amount to a renewal of the structure. REGINA *v.* D'OLIVEIRO - 45

3. ——The mere keeping of pigs in one's premises, is no offence under the Conservancy Act XIV. of 1856, and Ordinance 2 of 1879: to bring the case within section 43, it must be shewn the premises are "in or near any street," and such "street" is within the prescribed limits. Where a person is charged with doing an act without a license, but the existence or non-existence of such license is peculiarly within the knowledge of the prosecutor, it is for the prosecution to shew the prisoner had no license, and not for him to shew he had one. A conviction which states a prisoner is ordered to pay costs, but omits to state the amount, is bad and liable to be quashed. —*Semble.* Such an error might be amended, by the case being remitted to the Magistrate to state a definite amount.—*Query,*—Has the Magistrate power to fine for costs, on convictions for offences other than under the Police Act XIII. of 1856? A prisoner held a license for a slaughter-house,—*Held,* such license necessarily implied a right to keep pigs for the purpose. A prisoner who pleaded guilty to a charge which stated no offence in point of law, and against whom the evidence also disclosed no offence, was permitted to appeal against the conviction and sentence thereby following, and such conviction was quashed. MUN. COMERS. *v.* CHUAH SENG & ORS. - - - 140

CONSTRUCTION OF CONVICTIONS —Justices of the Peace - - - 10

see RECORD OF CONVICTION.

CONTRABAND ARTICLES—Forfeiture of,—imperative on Magistrates on conviction of offender - - - - - 156

see CHANDOO. 3.

CONTRACT—Infancy - - - 1

see COURT OF REQUESTS. 1.

CONTRACT—*continued.*

——Labour,—*see* Labour, 1, 3, 6, 7. - - - 16, 71, 164, 186

——Engagement of Police Constables - - - - - - - - 194

see POLICE. 2.

CONVICTION—Where the Information and Summons against a defendant charged him with an offence under one section,—*Held,* that a conviction under a different section could not be sustained - - 6

see WITNESS. 1.

2. ——Doubtful meaning of Regulation or Act - - - - - - - 10

see RECORD OF CONVICTION.

3. ——Amendment of,—by Court, where mistake one of form - - - 67

see LOTTERY.

4. ——Indian Evidence Act—*see* Evidence. 2. - - - - - - 79

5. ——A conviction which awards costs, must shew the amount thereof, otherwise the conviction will be bad- - - 88

see MISCHIEF. 1.

6. ——Sentence under a section different from that charged, bad - - - 98

see GAMBLING. 3.

7. ——Irregularity in calling of witnesses - - - - - - - 98

see IRREGULARITY.

see also WITNESS - - 6

8. ——Jurisdiction - - - 99

see GRIEVOUS HURT.

9. ——Theft—Cheating—Evidence 117

see THEFT. 1.

10. ——One penalty for two distinct offences - - - - - - - 119

see NOTICE OF APPEAL.

11. ——When reasonable or arguable ground of objection to,—Magistrate ordered to state case - - - - - 120

see MAGISTRATE. 12.

12. ——Seal of Office—Defect - - 136

see MAGISTRATE. 16.

13. ——Costs when ordered to be paid, amount must be stated in - - 140

see CONSERVANCY. 3.

14. ——A conviction for two offences, and awarding one punishment, is bad. The objection is not a formal one, and is not aided by Sections 32 and 33 of the Appeals Ordinance 12 of 1879. CARTAN *v.* MEENACHEE - - - - - - 151

15. ——Proof of previous,—formal record—evidence - - - - - 171

see GAMBLING. 5.

COSTS—As to Magistrate's power to award, —under the Penal Code—costs in Conviction - - - - - - - - 88

see MISCHIEF. 1.

———Crown not being named in Appeal Ordinance not liable for,—in an appeal - - - - - - - - - 99

see LABOUR. 4.

———As to Magistrate's power to fine for costs on convictions for offences other than under the Police Act XIII. of 1856—amount to be stated in Conviction— 140

see CONSERVANCY. 3.

———Survey—Land in dispute - 158

see LANDMARKS.

COUNSEL—The absence of Counsel for a prisoner, although unavoidable, is no ground for postponing the trial of a case; and the refusing to do so by a Magistrate, is no ground for an appeal, although the prisoner be convicted. VELLOO PULLAY *v.* KADIER & ANOR. - - - - - 50

COURT OF REQUESTS—The Court of Requests has jurisdiction to adjudicate on a case, where the debt originally exceeded the limited amount, but has been reduced below it, by part-payment,—the Statute of Limitations,—or the infancy of the contractor: and the reason for this is, because these defences go to the root of the claim and operate to the disaffirmance of the debt, and although a larger sum may become the subject of enquiry, yet the whole *existing debt*, is within the necessary amount. Such original debt, however, to which there is only a partial defence as a set-off or tender, is not within its jurisdiction, as it is optional with a defendant whether he will avail himself of the defence or not, and until he does so, there is *no existing debt* within the necessary amount. The general principle for deciding whether a defence is to be taken as part-payment or set-off is, to ascertain whether, by the course of dealing between the parties, the items of their respective accounts are to be set against each other, and any monies or the value of goods received by the one are to be treated as made in liquidation of the other's account —or whether no such course of dealing exists, and the transactions are substantially unconnected and distinct. In the former case, the dealings will operate as a part-payment, and any balance on the account, under the limited amount, will be within the jurisdiction of the Court of Requests—in the latter they will be mere matter of set-off, optional to the defendant, and will not be within such jurisdiction. The clause in the Charter of 1826, relating to the "debt, duty or matter in dispute" triable before a Court of Requests, must be read *riddendo singula singulis*, and the words "matter in dispute" mean: the thing claimed and denied, and not anything which may come incidentally in question, and has not the same meaning as the previous word "debt." The word "debt," applies to cases where there is a definite sum due, within the limited amount, and the words "duty or matter in dispute," to the unspecified class of other suits and causes of small amount, to which the power of the Court also extends. WARN *v.* GAUDART - - - - - - - - 1

2. ——A plaintiff sued a defendant in the Court of Requests, for money lent to the defendant, in order to help her in distress during her husband's illness, and obtained judgment against her. On appeal, this Court refused to interfere with the decision, although the loan was made to the defendant, a married woman, during her husband's lifetime, and since his death neither she nor any one else had taken administration to his estate. MYMOONA *v.* MAHOMED - - - - - - 10

3. ——A Commissioner of the Court of Requests, although he is and can only be a Magistrate, has not, when he sits as Commissioner, the powers of a Magistrate, and cannot therefore fine, or commit to prison for an assault on his peon, or the like, except as provided by the Court of Requests Act, 1866. *In re* VANJOOR MUSTAN - 122

COURTS—Origin and constitution of the Court of Quarter Sessions, of two Magistrates, and Police Courts, considered. 110

see APPEAL. 5.

CRIMINAL BREACH OF TRUST—*see* Partnership - - - - - - 79

see also Breach of Trust. - 104

————CONVERSION—*see* Moveable Property - - - - - - 86

————INTERCOURSE—*see* Trespass - - - - - - - - 131

————MISAPPROPRIATION — *see* Moveable Property - - - - - 86

see also Claim to Property. 2. - 134

CRIMINAL TRESPASS—Before a person can be convicted of criminal trespass, it must be shewn affirmatively, that he entered into the place in order "to intimidate, insult or annoy, or to commit an offence," withing section 441 of the Penal Code,—*Query*. Has the Magistrate power under section 60 of Ordinance 12 of 1872, to bind a person over to keep the peace on conviction of criminal trespass? CASSIM *v.* HAJI MAHOMED SYED - - 101

CRIMINAL TRESPASS—*continued.*
2. ——Adultery—Annoyance—Insult. 131
see TRESPASS.
CROWN—Costs in appeal - - 99
see LABOUR. 4.
————No party to an appeal—locus standi - - - - - - - 144
see APPEAL. 7.
————LAND-Trespass—Evidence—animus furandi - - - - - - 143
see THEFT. 2.
————————Encroachment—abettor of mischief - - - - - - - 154
see MISCHIEF. 3.
CUMULATIVE TERM—Distinct offences—power of Magistrate - - - 182
see MAGISTRATE. 20.
DEBT—Part-payment—Defence—Statute of Limitations - - - - - 1
see COURT OF REQUESTS. 1.
DEFENCE—Evidence in reply after defence closed—irregularity - - 79
see EVIDENCE. 2.
————Calling of witnesses for prosecution after defence closed - - 98
see IRREGULARITY.
————Application to search for prosecutor's books to be evidence for,—refused - - - - - - - 107
see SEARCH WARRANT.
DISHONEST MISAPPROPRIATION OF PROPERTY—*see* Partnership - 79
DISTINCT OFFENCES—One penalty for two,—Conviction quashed - - 119
see NOTICE OF APPEAL.
————————————Magistrate no power to sentence for,—for cumulative term exceeding six months - - - 182
see MAGISTRATE. 20.
ENGLISH LAW—As applicable to this Colony - - - - - - - 16
see LABOUR. 1.
see also GAMBLING. 2. - 94
EVIDENCE—Witness present in Court 6
see WITNESS. 1.
2. ——After the case for the defence has been closed, evidence in reply, which corroborates the case for the prosecution is inadmissible: but if the evidence is immaterial by reason of there being sufficient evidence to convict, apart from the evidence so wrongfully admitted, the irregularity is cured by section 57 of Act II. of 1855, and the conviction will be upheld. Act II. of 1855, sec. 57, applies to convictions by Magistrates. VERSAY *v.* MAHOMED HANIFF - - - - - - - 79
3. ——Conviction for unlawful assembly—evidence of free fight - - - 89
see UNLAWFUL ASSEMBLY. 1.
4. ——Conviction on the evidence of a lesser offence—appeal by prosecution—no interference with Magistrate's decision. 92
see PROSECUTOR. 1.
5. ——Irregularity—witnesses called for prosecution after defence closed - 98
see IRREGULARITY.
6. ——On the hearing of a criminal charge against a prisoner, the Magistrate's notes of evidence of a previous case tried before him, although relating to the same subject-matter and against the same prisoner, is not admissible in evidence. LETCHMEE & ANOR. *v.* RAMASAWMY. 102
7. ——Production of Letter - - 104
see BREACH OF TRUST.
8. ——Production of prosecutor's *books* as evidence for the defence - - 107
see SEARCH WARRANT.
9. ——Magistrate's decision not reversed unless grossly against the weight of evidence - - - - - - - - 108
see MAGISTRATE. 11.
10. ——Kidnapping from lawful guardianship—age of minor - - - 109
see KIDNAPPING. 1.
11. ——Conviction for theft or cheating - - - - - - - 117
see THEFT. 1.
12. ——Bad character of accused—conviction - - - - - - 130
see MAGISTRATE. 15.
13. ——Possession of Chandoo—custody—control - - - - - - - 132
see CHANDOO. 2.
14. ——Claim to property—Jurisdiction - - - - - - - - 134
see CLAIM TO PROPERTY. 2.
15. —— Magistrate—knowledge of facts—cross-case - - - - - - 138
see MAGISTRATE. 17.
16.——Proof of previous convictions—production of formal record - - - 171
see GAMBLING. 5.
EXCISE CASE—Information in, and Commitment of person to Jail—no part of appeal in,— - - - - - - - 136
see MAGISTRATE. 16.
FACT—Magistrate's decision on matters of,—non-interference of Court - - 92
see PROSECUTOR. 1.
see also MAGISTRATE. 11. - 108

FEAST—Holding of Kunduri or,—at private residence—Police Pass not required - - - - - - 118

see KUNDURI.

FIGHT—Rioting—no common object—conviction quashed - - - - 61

see RIOTING.

see also Unlawful Assembly. 1. - - 89

see also Insult. 1. - - - 90

FINE—Magistrate's decision not reversed on ground of smallness of - - - 108

see MAGISTRATE. 11.

FOREIGNER—Jurisdiction of Magistrate to try,—for assault on high seas—foreign ship - - - - - - - - 152

see JURISDICTION. 7.

FOREIGN SHIP—*see* Jurisdiction. 7. 152

GAMBLING—In order to render a person liable to conviction for gaming, it must appear he was gambling in a street or in a place used as a common gaming house: the fact of being merely found gaming with others in a casual private spot or house, does not bring the case within the Act. REGINA *v.* TAN AH FOOK - 43

2. ——A house kept up by private subscription among members, at which they met, ate, drank, played games of "chike," dominoes, cards, &c., for money, on certain days of the week, and occasionally remained one night, was not a "common gaming house," within the Gaming Ordinance 9 of 1876. The Statute Law of England relating to gaming, and the English Statutes declaring certain games illegal, do not extend to this Colony. Observations on games played at Clubs, &c., and on games of skill and chance. REG. *v.* TAN SIN HAP & ANOR. - - - - - - 94

3. ——Before a person can be convicted of gambling or being the owner of a common gaming house, the prosecution must shew by evidence, what the game is that is played, so that the Court can decide whether the game falls within the Act or not. A charge under one section of an Act followed by a conviction under a different section of another Act, is bad. REG. *v.* SHEIK HOSSAIN & ORS. - - - 98

4. ——A Justice of the Peace is entitled under the Gaming Ordinance XIII. of 1879, to enter a house without a warrant, on receipt of information that a house is a common gaming house. The fact that a Justice of the Peace so acts under section 10 of the Ordinance, and afterwards appears as prosecutor in the case, does not make the seizure bad, or the proceedings before the Magistrate, irregular. Reg. *v.* LEE HONG KANG & ORS. - - - - - - 145

GAMBLING—*continued.*

5. ——"Occupier," in section 2 of the Gaming House Ordinance 13 of 1879, means a person having actual, and not merely constructive occupation, of the place alleged to be the Gaming House. In order to prove that a place is used as a Gaming House, so as to render the owner or occupier thereof liable under the Act, it is necessary to shew, by direct evidence, that the place had been so used; or, if there are convictions against persons, for having been found gaming in such place, the formal records of such convictions must be produced, and *vivâ voce* evidence of the fact of such convictions, is inadmissible. REG. *v.* AW ENG THO - 171

6. ——The mere possession of instruments for gaming, is not permissible under the Gaming Ordinance 13 of 1879. REG. *v.* ABBASS & ANOR. - - - - - 184

GAMING—*see* Gambling—*see also* Lottery.

GOVERNMENT TIMBER—Evidence—Theft - - - - - - - - 143

see THEFT. 2.

GRATIFICATION—Receiving,—Official act - - - - - - - - 114

see RECEIVING GRATIFICATION. 1.

GRIEVOUS HURT—Where, in an attack on a person, a bone is broken, this makes the offence "grievous hurt" under the Penal Code; and a Magistrate has no jurisdiction to dispose of the case summarily. The evidence in the case shewed that the respondent had been attacked, and a bone of his finger broken: the Magistrate having tried the appellants summarily, and convicted them of voluntarily causing hurt, this Court quashed the conviction as having been made without jurisdiction, and directed the case to be remitted to the Magistrate to be heard as a preliminary proceeding, and committed to the Assizes. MAN & ANOR. *v.* SAMSAH - - - - - - - - 99

GUILT—Plea of,—Conviction quashed on appeal - - - - - - - - 140

see CONSERVANCY. 3.

HURT—Attack—jurisdiction - - - 99

see GRIEVOUS HURT.

HUSBAND—Loan to married woman—administration - - - - - 10

see COURT OF REQUESTS. 2.

————Magistrate no jurisdiction to order married woman to return to her,—126

see MARRIED WOMAN. 2.

ILLEGAL ENTRY—Finding of Chandoo—Civil Action - - - - - 132

see CHANDOO. 2.

ILLICIT ARTICLES—Forfeiture of,—imperative on Magistrates on conviction of offender - - - - - - - 156
see CHANDOO. 3.

IMMIGRANT—*see* Labour. 4, 5. 99, 148

INACCURACY—Notice of Appeal - 119
see NOTICE OF APPEAL.

INDIAN ACTS—*see* ACTS.

INFANCY—Part-payment—Statute of Limitations - - - - - - 1
see COURT OF REQUESTS. 1.

INFORMATION—Offence disclosed—Magistrate to issue summons - 102
see SUMMONS.

————Order on,—being read—no hearing - - - - - - 106
see BREACH OF THE PEACE.

————Excise Case—Commitment—no part of appeal case - - 136
see MAGISTRATE. 16.

INSULT—Before a conviction can be had under section 504 of the Penal Code, it must be shewn that the insult was given with the intention of causing the person insulted to commit a breach of the peace. Where therefore five men, of a night, visited the house of the prosecutor, and called him out to fight, and abused him.—*Held*, that as the prosecutor single-handed was not likely to go out and attack the five men, there was no evidence of such intent, and the conviction was quashed. *Query*,—Whether the Magistrate can, on a conviction under section 504 of the Penal Code, order the prisoner to be bound down to keep the peace?—*Query*. Is an order to keep the peace bad, if it omit the alternative sentence of imprisonment under section 60 of Ordinance 13 of 1872? MOOTOO & ORS. *v.* AYAH DOREH PILLAY - 90

2. ——Criminal Trespass—Intimidation—Intent - - - - - - 101
see CRIMINAL TRESPASS. 1.

3. ——Criminal house-trespass—Criminal intercourse - - - - - 131
see TRESPASS.

4. ——Taking of property by force—high-handed acts - - - - - 167
see CLAIM TO PROPERTY. 3.

INTENT—Insult— Breach of the Peace 90
see INSULT. 1.

INTEREST—Mortgagor—Non-redemption of mortgage—Notice—Mortgagee 186
see MORTGAGE. 1.

IRREGULARITY—A mere irregularity in the trial of a case before a Magistrate, such as calling witnesses for the prosecution after the prisoner has been called on for and stated his defence, is not such as will induce the Court to quash the conviction. CHOOASHARY & ANOR. *v.* CASSIM. 98

JURISDICTION—Part-payment—Statute of Limitations—Infancy of Contractor- 1
see COURT OF REQUESTS. 1.

2. ——A prisoner who commits an offence out of the jurisdiction, cannot be proceeded against, unless it be under Act 1 of 1849, or VII. of 1854, and the Information for a Warrant for his arrest, ought to disclose such facts as bring the case within those Acts. Therefore, where A. laid an information against B, alleging that certain tin belonging to him was stolen by a third party at Larut, and that such third party had shipped the tin on board B's vessel, and ordered him to get it resmelted, so as to obliterate A's marks, and then to bring the tin to this Settlement for sale, which B. accordingly did, knowing all the while it was stolen property,—and praying for a search-warrant to seize such tin and compel B. to give an account of the manner in which it came into his possession,—but did not comply with the provisions of either of the above-named Acts, or disclose such facts as to bring the case within those Acts, —*Held*, [affirming the decision of the Police Magistrate], that the Information was insufficient, and on the face of it, no jurisdiction appeared, and that therefore a search warrant ought not to issue. A Magistrate has power to recall a warrant issued by him, although it may be in the hands of the Police, if he subsequently considers that by granting the warrant he exceeded his jurisdiction. HO GHEE SIEW & ANOR. *v.* NACODAH MAHOMED - - - - - 51

————Discontinuation of Nuisance- - - - - - - - 85
see NUISANCE. 2.

3. ——A Magistrate has no,—to dispose of a case of "grievous hurt" summarily- 99
see GRIEVOUS HURT.

4. ——Conviction of Criminal Trespass—Order to keep the peace - - 101
see CRIMINAL TRESPASS. 1.

5. ——Where the evidence in a case leaves it doubtful which of two or more offences [some within and some beyond the Magistrate's jurisdiction] a prisoner has committed, and the Magistrate has convicted for one within his jurisdiction, this Court will not interfere with his decision: but where the evidence shews that the prisoner has committed only one and that a graver offence, and the Magistrate has wrongly convicted him of a lesser offence and one

JURISDICTION—*continued.*
over which he has jurisdiction, the Court annulled the conviction, and remitted the case to be dealt with as on the graver charge. Where therefore a Constable in order to obtain money, falsely charged a milk-man with having adulterated milk in his possession, and threatened to take him before the Magistrate on such charge, and thereby obtained money from the man in consideration of his releasing him,—and the Magistrate convicted the Constable of receiving a gratification for forbearing to do an official act,—*Held*, that the conviction could not be sustained, as the Constable forbore to do not an official act, but a wrongful act, and the Magistrate had no jurisdiction. SECUNDER *v.* KYAMBOO—REG. *v.* SHAVOO-116

6. ——married woman—return to conjugal domicile- - - - - 126

see MARRIED WOMAN. 2.

7. ——A Magistrate has no jurisdiction to try a foreigner for an assault on the high seas on board a foreign ship. The words "any person" and "wheresoever committed," in the Statute 12 & 13 Vict., c. 96, s. 1, though general in its terms, apply only to offences committed by British subjects, or on board British ships. The Statute merely confers on the Criminal Courts of Common law, the jurisdiction formerly possessed by the Admiralty, but no more: the jurisdiction of the Admiralty was limited as above. HASS *v.* CHOO CHYE HOK. - - 152

JUSTICE OF THE PEACE—General observations on duties of,—Construction of their convictions - - - - 10

see RECORD OF CONVICTION.

——Power to enter gaming-house without warrant on Information received - - - - - 145

see GAMBLING. 4.

KIDNAPPING—Where a prisoner is charged under section 363 of the Penal Code, with kidnapping a minor under sixteen, from lawful guardianship, the prosecution ought to shew by satisfactory and conclusive evidence, that the child is under that age. Where the only evidence was, that of the minor that her mother had told her her age, and the alleged guardian stated that the mother had also told her the same, but the parents of the child,—being out of the jurisdiction, were not called,—*Held*, that the evidence of age was too slight for consideration, and the conviction was annulled. Where the alleged guardian stated the minor was a niece of her husband, and had been adopted by her for the then past seven years, and the minor spoke of the guardian as her aunt,—*Held*, [in the absence of evidence to the contrary] that there was

KIDNAPPING—*continued.*
ample evidence of lawful guardianship. FONG AH CHAN *v.* KAH SEW - 109

KNOWLEDGE OF FACTS—Adjudication by Magistrate—Evidence - - 138

see MAGISTRATE. 17.

KONGSI—Secret Society,—Fight—Common object - - - - - - 61

see RIOTING.

——— Unlawful assembly—Common object - - - - - - - 89, 118

see UNLAWFUL ASSEMBLY. 1, 2.

KUNDURI—The holding of a kunduri or feast in one's private residence, does not require a pass from the Police authorities, and the holding of such kunduri, apparently without a pass, is not illegal, so as to render persons assembled with the object of disturbing such kunduri aud preventing people from attending same, not punishable under section 143 of the Penal Code. NAWAS & ANOR. *v.* SHAIK RAJAH ALLI - 118

LABOUR—The fact that a labourer has already been convicted under Act 4, Geo. IV., c. 34, for absenting himself from work, is no bar to his prosecution under the same Statute for a second absenting, although during the existence of the same contract. The Act 4, Geo. IV., c. 34, is law in this Colony, and the Magistrate's power under it, is not exhausted by such first conviction. The Law of England [Common law, Equity, and Statutory] as applicable to this Colony, discussed. REGINA *v.* WILLANS. 16

2. ——The respondents were laborers, and had entered into a contract to work as such, on appellant's Estate, for 24 calendar months; six days before the contract expired, they refused to work any further, and were summoned before the Magistrate—they were summoned before the term expired, but the case was heard after the expiration of the term. They had also refused to work on various other days during the term.—*Held*, the Magistrate could, under the Act XIII. of 1859, order them to return and work the six days, as also for such other days as they had refused to work. LAMB *v.* PONEN & ORS. - 62

3.—— The respondents, who were laborers on a Sugar Estate, and had entered into a contract to work for one year, were charged before the Magistrate with fraudulent breach of contract. It appeared that the contract was still unexpired, but the advances had been paid off. It also appeared that they refused to work in consequence of the appellant, their master, claiming to withhold their wages for seven weeks, after it was due, on the ground of a general custom to such effect. The contract was silent as to time of payment of wages.—

LABOUR—*continued.*

Held, firstly, that there can be a fraudulent breach of contract, notwithstanding the advances had been paid off, and the Act XIII. of 1859 was applicable to such a case. *Secondly*, that the custom was neither universal, certain nor reasonable, and the laborer had "lawful and reasonable excuse," for refusing to work. *Tara Duss Bhuttacharje* v. *Bhaloo Sheik*, [8 Sutherland's W. R. Cr. 69] not followed. LAMB *v.* KATTAN & ORS. - - - - - - - 71

4. ——The Labour Ordinance 1 of 1876, which makes the bringing of an Immigrant to this Colony from India, without observance of the formalities therein prescribed, an offence, applies only to Immigrants who are natives of "Britith India." The Crown not being named in the Appeal Ordinance, no costs can be awarded against it in an appeal. REG. *v.* SHAIK ISHMAEL LEBBY 99

5. ——No rules for the accommodation of Immigrants employed on Estates, having been prescribed under sections 36 & 39 of Ordinance 1 of 1876, no conviction for neglecting to provide such accommodation can be had. REG. *v.* TAN SIM HO - - 148

7. ——A laborer contracted, in consideration of certain advances for his passage money, &c., and a promise by the employer to pay him small monthly wages, to serve his employer, as a laborer on his estate, for a period of 360 days; and should he borrow of his employer sums of money in excess of the wages and advances agreed to, that he would not abscond or run away or otherwise leave the estate before having paid the amount of work agreed to, or the monies borrowed in excess of his due. He thereafter worked out his 360 days, but during this time drew monies in excess of his due. After the 360 days were over, he refused to work any longer under the contract at the wages therein specified, but having drawn in excess of his due, he remained on the estate ready to work at the usual wages of the country, and neither absconded, ran away or otherwise left the Estate. The employer considering he was entitled to the laborer's services beyond the 360 days, until the amount drawn in excess of the man's due for that period was paid off, by wages stipulated for in the contract, charged the laborer under section 14, clause 5 of Ordinance 1 of 1882, with absenting himself from his employer's service,—*Held*, on appeal, affirming the decision of the Magistrate, that there was no absenting himself [by the labourer] from his employer's service, as there was nothing in the contract requiring the labourer to work beyond the 360 days; that the labourer had done all he contracted to do in consideration of his being in his employer's debt, by remaining on the estate without absconding or running away or otherwise leaving the Estate, and the Magistrate was right in dismissing the case no sooner these facts appeared. KOH BOO AN *v.* TIOH JEE - - - - - 164

7. ——A labour contract made under the provisions of an Ordinance, is not put an end to, by a subsequent repeal of that Ordinance; but [provided the repealing Ordinance does not re-enact the penalties], the Statutory incidents only,—[such as dealing with breaches of the contract criminally],—are done away with. Section 10 of the Labour Contract Ordinance 1 of 1882, includes cases of contracts for labour,—breaches of which, prior thereto, were not punishable criminally; provided there is no express provision in the contract itself, to the *contrary*. The absenting from service by a *labourer*, is a continuing breach, and an "offence" committed *de die in diem*; and may so be dealt with. Where therefore a laborer contracted under Ordinance 2 of 1877, to serve his master for a certain number of days, but before the time was out, absconded from the Estate and was never seen again until arrested in October 1884—but in the interval, the Ordinance of 1877 was repealed by Ordinance 4 of 1880, which did not re-enact penalties for breaches of Contract—and by Ordinance 1 of 1882, which became law in February, 1884, all contracts for service made prior to that Ordinance, were to be considered in force after the passing of that Ordinance, and subject to the liabilities of that Ordinance, whereby criminal liability for breaches of labour contracts was restored [although between 1880 and 1882 there had been a suspension of such liabilities]—and the laborer having been arrested in 1884, was charged before the Magistrate with absenting,—*Held*, 1*st*, the contract for service was still a subsisting one; 2*nd*, that it was a contract for service within Section 10 of the Ordinance of 1882, and that breaches thereof were liable to be dealt with criminally; 3*rd*, that the absence of the laborer was a continuing breach, and an offence *de die in diem*, and so punishable under that Ordinance, as amended by Ordinance 3 of 1883. ONG HONG JIOW *v.* TEH TAN KIAT - - - - - - - 189

LAND—Encroachment on Crown,—Cutting of timber - - - - - 154

see MISCHIEF. 3.

——— Power of Collector of Land Revenue to order survey of,—in cases of dispute—landmarks - - - - - 158

see LANDMARKS.

LANDMARKS—Except there is a dispute as to the proper position of landmarks, and the matter is reported to the Collector, there is no power in the Collector of Land Revenue to order a survey of any land with a view to putting up or repairing landmarks under Ordinance 7 of 1882; and the owner of such land cannot be ordered to pay the expenses of such survey. The fact that the land is overgrown, and there are no proper landmarks marked out, although necessitating a survey, does not render the owner of such land liable to pay the expenses of the survey, where the Collector has proceeded merely after notice, under Section 6 of the Ordinance. A Magistrate [on the prosecution by the Collector of Land Revenue] having, under such circumstances, ordered the defendant, the owner, to pay the expenses of such survey, on appeal, such order was quashed and costs awarded against the Collector. REG. *v.* KWEH TE HIN - - - - - - - - 158

LAWFUL GUARDIANSHIP—Kidnapping from,—Age—Evidence - - 109

see KIDNAPPING.

LAW OF ENGLAND—As applicable to this Colony - - - - - - 16

see LABOUR. 1.

see also GAMBLING. 2 - 94

LICENSE—Where a person is charged with doing an act without a license, but the existence or non-existence of such a license is peculiarly within the knowledge of the prosecutor, it is for the prosecution to shew the prisoner had no license, and not for him to shew he had one - 140

see CONSERVANCY. 3.

see also PAWNBROKER. 1 - 124

LIMITATIONS—Statute of,—Jurisdiction—Part-payment - - - - - 1

see COURT OF REQUESTS. 1.

LOCUS STANDI—Crown—Parties to an appeal - - - - - - - 144

see APPEAL. 7.

LOTTERY—Where a person carries on the business of a public lottery, and all the proceedings therein, up to the time of declaring the winner and paying him his winnings—such as the sale of tickets, staking, &c.,—is done by means of Collectors who go from place to place in pursuit of their object—but the declaring the winner is made from a house or compound, at which the players are notified to assemble,—*Held*, that although the actual declaration may have been made on land which abutted from such compound upon a public street, yet such declaration is from a "place" within the meaning of Ordinance 13 of 1870.

LOTTERY—*continued.*

Where a conviction was in effect under one clause of the Ordinance, but by mistake was stated to be under another,—*Held*, the mistake was only as to matter of form, and the Court amended the conviction by striking out the incorrect clause, and inserting the proper one. REGINA *v.* KOOMAH 67

MAGISTRATE—Not legally justified in allowing Revenue case to be withdrawn, offence not being of a private nature—A Magistrate may adjourn a case to consider his decision - - - - - - 6

see WITNESS. 1.

2. ——The doubtful meaning of a Regulation or Act does not excuse a Magistrate from stating in the record of conviction the particular clause or section alleged to be infringed - - - - - - 10

see RECORD OF CONVICTION.

3. ——A Magistrate has power to recall a warrant issued by him, although it may be in the hands of the Police, if he subsequently considers that by granting the warrant he exceeded his jurisdiction - 51

see JURISDICTION. 2.

4. ——A Magistrate may, in the cases referred to in section 62 of Ordinance 6 of 1873, convict for one offence when the charge is for another - - - 84

see NUISANCE. 1.

5. ——As to his power to award costs for offences under the Penal Code - 88

see MISCHIEF. 1.

6. ——It is inconsistent, and open to serious objection, that a person who is Assistant Superintendent of Police and receives reports of cases as such, should act as Magistrate, and afterwards try the same cases - - - - - - - 89

see UNLAWFUL ASSEMBLY. 1.

7. ——Adjudication of,—on evidence before him—refusal of Court to interfere with decision - - - - - - 92

see PROSECUTOR. 1.

8. ——Evidence disclosing more serious offence—commitment ordered to Assizes 99

see GRIEVOUS HURT.

9. ——As to his power to order a person to be bound over to keep the peace on conviction of criminal trespass - 101

see CRIMINAL TRESPASS. 1.

10. ——No option in granting or refusing a summons - - - - - 102

see SUMMONS.

11. ——A Magistrate's decision will not be reversed on the ground of its being against the weight of evidence, unless it be

MAGISTRATE—*continued.*

grossly so. When a Magistrate has fined a prisoner, the Court will be reluctant to allow an appeal, when the only complaint is the smallness of the fine. GAN KIM SWEE *v.* NEWLAND - - - - - - 108

12.—— If there is a reasonable or arguable ground of objection to a conviction, an application to state a case under the Appeals Ordinance, Section 18, is not "frivolous." A Magistrate refusing, under such circumstances, to state a case, will be ordered to do so. NARAINASAWMY *v.* MARIAPEN - - - - - - 120

13.—— Powers as Commissioner of the Court of Requests in regard to fines and imprisonment - - - - - 122

see COURT OF REQUESTS. 3.

14.—— No power to order a married woman to return to her husband if she refuses to do so of her own accord - 126

see MARRIED WOMAN. 2.

15.—— A Magistrate should not admit in evidence, even against a well known offender, evidence of general bad character of the accused. If he so do, the conviction is liable to be quashed. MAMSAH *v.* MAHOMED LEBBYE - - - - - 130

16.—— Where a Magistrate awarded a penalty against a prisoner, and after the Court had risen, changed his mind, and ordered the fine to be reduced,—*Held,* he had no power to do so, and the conviction for the original amount was sustained. A conviction which is not sealed with the Magistrate's seal of office, is not liable to be quashed, as the defect is only formal and may be amended. The Information in an Excise case, and commitment of a person to Jail, are no part of the appeal case required to be stated under section 18 of the Appeals Ordinance 12 of 1879. LIM CHOW LENG *v.* OPIUM FARMER - 136

17.—— A Magistrate who has tried and adjudicated on a case, cannot import his knowledge of the facts thereof, acquired in such case, into a cross case by the same parties, concerning the same occurrence; but is bound to hear the whole of the evidence *de novo,* and adjudicate thereupon, otherwise the conviction is liable to be quashed. MERICAN & ORS. *v.* MAHOMED 138

18.—— As to power to fine for costs, on convictions for offences other than under the Police Act XIII. of 1856 - 140

see CONSERVANCY. 3.

19.——The forfeiture of illicit or contraband articles on conviction of the offender, is imperative on Magistrates - - 156

see CHANDOO. 3.

MAGISTRATE—*continued.*

20.——A Magistrate who tries a case under any of the sections enumerated *in* Section 5, clause 2, of Ordinance 13 of 1872, which may consist of more than one charge, cannot sentence the prisoner on each charge, so that the cumulative term exceeds six months.—*Semble.* A Magistrate in *no case* has power to sentence for distinct offences, all tried together, for a cumulative term exceeding six months,—*Query.* Has he the power to do so, where each distinct offence is tried and dealt with separately, when by law they might have been tried together? It is irregular, and improper, for a Magistrate to give a prisoner the option to be tried summarily, or be committed to the Assizes; or any option, in any criminal matter, at all. KADER KHAN *v.* HO FUK WENG & ORS. - - - - - - - - 182

MAGISTRATES—Origin and constitution of the Court of two,—considered - *110*

see APPEAL. 5.

————————Ordinance 5 of 1870 [Criminal Procedure Ordinance] does not apply to proceedings or convictions by - *117*

see THEFT. 1.

————————' APPEAL—Parties to —Crown - - - - - - *144*

see APPEAL. 7.

————————' NOTES—Previous Case —Evidence - - - - - - 102

see EVIDENCE. 6.

MARRIED WOMAN—Debt contracted during husband's life-time - - 10

see COURT OF REQUESTS. 2.

2.——The Magistrate has no jurisdiction under section 44 of Ordinance 13 of 1872, to order a married woman to return to her husband, when she is not detained from him against her will, but of her own accord, will not do so. That section, in cases of married women, applies only to cases of such women detained by some one else, and against their will. WEE LALAH *v.* OH KAN—OH KAN *v.* TAN CHUAN - - - - - 126

MINOR—Kidnapping minor under sixteen from lawful guardianship—Evidence of age—prosecution - - - - - 109

see KIDNAPPING.

MISAPPROPRIATION OF PROPERTY—A partner punished criminally for - 79

see PARTNERSHIP.

MISAPPROPRIATION OF PROPERTY —Cheque—illegal conversion - - 86

see MOVEABLE PROPERTY.

MISCHIEF—The wounding of an animal, though slight, is a sufficient change therein to diminish its value as to make the act

MISCHIEF—*continued.*

"mischief" within section 426 of the Penal Code. A conviction which awards costs, must shew the amount thereof, otherwise the conviction will be bad.—*Query.* Has the Magistrate power to award costs in cases of conviction for offences under the Penal Code. MAHOMED ANIFF *v.* EBRAM KHAN - - - - - - - - 88

2. ——*Bonâ fide* claim to property—subject-matter of charge - - - 105

see CLAIM TO PROPERTY. 1.

3. ——The mere fact of a person advancing money to the owner of an estate in order to enable him to work his estate, and taking a mortgage of the estate as security, does not make him liable to punishment as an abettor of mischief, by reason of the owner having encroached on Crown lands, and cut down timber. Nor does the fact that he is indirectly benefited by getting his wood free, make him so liable. REG. *v.* TAN POH KEAH - - - - - - - - 154

MORTGAGE—A mortgagor who does not redeem his mortgage on its due date, but permits the same to run on, and continues paying interest thereon, and who thereafter on notifying to the mortgagee his intention to redeem forthwith, is told that he will not be permitted to do so, except on payment of certain months further interest in lieu of notice, and who thereupon, but only in order to get back his Deeds and complete a sale he had arranged for, pays to the mortgagee the whole amount of principal and interest due, and also the further interest demanded by him—is not entitled afterwards to recover back the amount paid for such further interest, as money paid under duress, or by mistake, or as money had and received.—*Query.* Has a mortgagee in this Colony, whose mortgage is allowed by the mortgagor to run over its due date, by law or custom, the right to a notice from the mortgagor, of his subsequent intention to redeem, or to charge further interest in lieu of such notice, and if so, for what period? Is the practice in England of a six months' notice of an intended redemption, on six months' interest in lieu thereof, applicable here? MAHOMED SHAM *v.* KOMORAPAH CHETTY - - - - - - - - - 186

2. ——Owner of Estate—advance of money—abettor of mischief - - 154

see MISCHIEF. 1.

MORTGAGOR—Mortgagee—Redemption of mortgage—Interest—Notice - 186

see MORTGAGE. 1.

MOVEABLE PROPERTY—A cheque payable to order, but not endorsed by the payee, is "moveable property" within the meaning of the Penal Code. The words of section 403 being "misappropriates or converts," it is not necessary, in order to bring a person within that section, to shew he converted the property—it is sufficient if he appropriates the same, and such appropriation is wrongful. TUAN PUTEH *v.* DRAGON - - - - - - - - 86

MUNICIPALITY—*see* CONSERVANCY.

NEGLIGENCE—Pawnbroker—Compensation - - - - - - - 161

see PAWNBROKER. 3.

NOTES OF EVIDENCE—Criminal charge—Previous case - - - - 102

see EVIDENCE. 6.

NOTICE—Redemption of mortgage—interest—practice - - - - - 186

see MORTGAGE. 1.

NOTICE OF APPEAL—The mention in a notice of appeal of the Ordinance under which it is given, is not essential, and any inaccuracy in that respect is immaterial. Where therefore a notice of appeal purported to be given under the Appeals Ordinance 9 of 1874, a few days after its repeal by the new Appeals Ordinance 12 of 1879,—*Held*, the inaccuracy did not render the notice void or prevent the appeal being heard. Appellants were convicted for obstructing with their floating nets, the fair way of the South Channel, under section 25 of the Harbour Ordinance 8 of 1872, and in a second count with floating their nets in more than 2½ fathoms water, under section 37 of the Ordinance,—*Held*, these were two distinct offences, and as only one penalty was awarded, the conviction was bad. Sections 25, 32, 33, & 34 of the Appeals Ordinance 12 of 1879, do not enable the Court to amend such an error in a conviction. REG. *v.* OOI TIM & ORS. 119

NUISANCE—Section 62 of the Criminal Procedure Ordinance 6 of 1873, applies to Police Courts, and a Magistrate may, in the cases there referred to, convict for one offence, when the charge is for another. The carrying on of an offensive trade, is an offence within section 268 of the Penal Code, although the trade may have been for a long while acquiesced in, or was carried on long before the persons who complain, went to reside in that neighbourhood. REG. *v.* LIM PENG & ORS. - 84

2. ——The Magistrate, on convicting a person under section 290 of the Penal Code, has no power to order the discontinuing of the nuisance. MUN. COMERS. *v.* AH CHIN - - - - - - - - 85

OCCUPATION—Place — Occupier — finding of chandoo - - - - - 174
see CHANDOO. 4.
OFFENCE OUT OF JURISDICTION—*see* Jurisdiction. 2. - - - - 51
OFFENSIVE TRADE—*see* NUISANCE. 1. - - - - - - - 84
OFFICIAL ACT—*see* Receiving Gratification - - - - - - - 114
ONUS PROBANDI — License — prosecution—evidence - - - - - 124
see PAWNBROKER. 1.
see also CONSERVANCY. 3. - 140
OPIUM—*see* CHANDOO.
ORDINANCES:
4 of 1870 - - - - 100, 176
see CHANDOO. 1. 5.
——— s. 5 - - - - - 156
see CHANDOO. 3.
5 of 1870 - - - - 117
see THEFT. 1.
13 of 1870 - - - - 67
see LOTTERY.
20 of 1870, s. 25 - - - 107
see SEARCH WARRANT.
4 of 1871, s. 143 - - - 118
see KUNDURI.
——— s. 144 - - - 89
see UNLAWFUL ASSEMBLY.
——— s. 147 - - - 61
see RIOTING.
4 of 1871, s. 149 - - - 118
see UNLAWFUL ASSEMBLY. 2.
——— s. 161 - - - 114
see RECEIVING GRATIFICATION.
——— s. 162 - - - 116
see JURISDICTION. 5.
——— s. 268 - - - 84
see NUISANCE. 1.
——— s. 290 - - - 85
see NUISANCE. 2.
——— s. 324 - - - 99
see GRIEVOUS HURT.
——— s. 363 - - - 109
see KIDNAPPING.
——— s. 403 - - - 79
see PARTNERSHIP.
see MOVEABLE PROPERTY - 86
——— s. 426 - - - 88
see MISCHIEF. 1.
——— s. 441 - - - 101
see CRIMINAL TRESPASS. 1.
——— ss. 441, 442 - - 131
see TRESPASS.
——— ss. 441, 447 - - 167
see CLAIM TO PROPERTY. 3.
——— s. 504 - - - 90
see INSULT. 1.
1 of 1872, s. 26 - - - 194
see POLICE. 2.
7 of 1872, s. 5 - - - 124, 148
see PAWNBROKER. 1. 2.

ORDINANCES—*continued.*
8 of 1872, ss. 25, 37. - - 119
see NOTICE OF APPEAL.
12 of 1872, s. 60 - - - *101*
see CRIMINAL TRESPASS. 1.
13 of 1872, s. 5, cl. 2 - - - 182
see MAGISTRATE. 20.
——— s. 32 - - - - 103
see VAGRANCY.
——— s. 44 - - - - 126
see MARRIED WOMAN. 2.
——— s. 60 - - - - 90
see INSULT. 1.
——— s. 61 - - - - 106
see BREACH OF THE PEACE.
6 of 1873, s. 62 - - - 84
see NUISANCE. 1.
9 of 1874 - - - - 110
see APPEAL. 5.
see also NOTICE OF APPEAL 119
——— s. 25 - - - - 92
see PROSECUTOR. 1.
1 of 1876 - - - - 99
see LABOUR. 4.
——— ss. 36, 39 - - - 148
see LABOUR. 5.
9 of 1876 - - - - 94
see GAMBLING. 2.
2 of 1877 - - - - 189
see LABOUR. 7.
2 of 1879 - - - - 140
see CONSERVANCY. 3.
6 of 1879 - - - - 176
see CHANDOO.
——— s. 1 - - - - 156
see CHANDOO. 3.
12 of 1879, s. 18 - - 120, 136
see MAGISTRATE. 12, 16.
see also APPEAL. 7 - - 144
——— ss. 25, 32, 33, 34 - 119
see NOTICE OF APPEAL.
——— ss. 32, 33 - - - 151
see CONVICTION. 14.
13 of 1879 - - - - 184
see GAMBLING. 6.
——— s. 2 - - - - 171
see GAMBLING. 5.
——— s. 10 - - - - 145
see GAMBLING. 4.
4 of 1880 - - - - 189
see LABOUR. 7.
9 of 1881, s. 1 - - - 194
see POLICE. 2.
1 of 1882, s. 10 - - - 189
see LABOUR. 7.
——— s. 14, cl. 5 - - - 164
see LABOUR. 6.
7 of 1882, s. 6 - - - - 158
see LANDMARKS.
3 of 1883 - - - - - 189
see LABOUR. 7.
4 of 1884 - - - - - 176
see CHANDOO. 5.

ORDINANCES—*continued.*
PARTIES TO AN APPEAL—Prosecutor —prisoner - - - - - - - 144
see APPEAL. 7.
PARTNERSHIP—A partner who dishonestly misappropriates part of the partnership property, is liable to be punished criminally under section 403 of the Penal Code. HAJI SAHID *v.* SHAIK PEROO 79
PART-PAYMENT—Statute of Limitations—Infancy of Contractor - 1
see COURT OF REQUESTS. 1.
PASS—Police,—Kunduri—Feast - 118
see KUNDURI.
PAWNBROKER—On a charge under section 5 of the Pawnbroker's Ordinance 7 of 1872, it is for the accused to shew he has a license, and not for the prosecution to shew that he has not. The Pawnbroker cannot prosecute for a breach of the Ordinance, committed before the term of his exclusive privileges, and during the time of the previous Pawnbroker. Prosecutions under the Pawnbroker's Ordinance are, by the Ordinance, impliedly confined to the Pawnbroker, or a person acting as his informer on his behalf as his *Chinting* or Revenue Officer. KHOO AING HONG *v.* MEYAPAH CHETTY, &c. - - - - - - - - - 124
2. ——A single act of taking a pledge or pawn, does not make a person punishable under section 5 of the Pawnbroker's Ordinance 7 of 1872, for "carrying on the trade of a pawnbroker." PAWNBROKER *v.* RAMSAWMY PADIACHEE - - - 148
3. ——A pawnbroker who permits large numbers and grades of his employés to have access to articles of value pledged with him, beyond what a man of ordinary prudence would do, when such goods had been deposited with him, is guilty of negligence and liable to make compensation if such goods are lost without explanation. BOEY AH SAM *v.* SEOW AH SEONG - - 161
PEACE—Breach of the,—*see* Breach of the Peace - - - - - - - 106
——— Order to keep the,—power of Magistrate under Section 504 of the Penal Code—alternative sentence of imprisonment - - - - - - - 90
see INSULT. 1.
——— Order to keep the,—power of Magistrate under Section 60 of Ord. 12 of 1872 - - - - - - - 101
see CRIMINAL TRESPASS. 1.
———Order without hearing, for breach of the,—informality - - - 106
see BREACH OF THE PEACE.
PENAL CODE—[Ord. 4 of 1871]—*see* Ordinances.
PENAL CODE—*continued.*
———As to costs under the,—*see* Mischief. 1. - - - - - 88
PENALTY—Reduction of,—by Magistrate after rising of Court - - - 136
see MAGISTRATE. 16.
PIGS—Street—License—Slaughter-house - - - - - - - 140
see CONSERVANCY. 3.
PLEA OF GUILT—Conviction quashed on appeal notwithstanding,— - - 140
see CONSERVANCY. 3.
PLEDGE—Single act of taking pawn - 148
see PAWNBROKER. 2.
POLICE—It is inconsistent and open to serious objection that a person who is Assistant-Superintendent of Police and receives reports of cases as such, should act as Magistrate and afterwards try the same cases - - - - - - - - 89
see UNLAWFUL ASSEMBLY. 1.
2. ——A person who is *de facto* a Police Constable [whether he be under a formal engagement to serve as such or not] is liable to be punished under Section 26 of the Police Force Ordinance 1 of 1872, if he commits any of the offences enumerated in that Section.—*Semble.* Where there is no time specified by an order of the Governor, under section 1 of Ordinance 9 of 1881, for the term to be named in a Contract of a Constable, a Contract made under that Ordinance is void, if it be for a term of five years. REG. *v.* KELLY & ANOR. - 194
———*see also* SUMMONS - - 102
———Receiving Gratification - - - - - - - - 114
———JURISDICTION. 5. - 116
———MAGISTRATE. 20. - 182
POLICE COURTS—Origin and Constitution of,—considered - - - - 110
see APPEAL. 5.
———PASS—Holding of Kunduri or feast - - - - - - - 118
see KUNDURI.
POST OFFICE—Where a person is charged under section 46, clause 2 of the Post Office Act XIV. of 1866, with performing postal services otherwise than through the Post, it is no excuse that the Post neither do, nor can undertake the carriage of such letters to their ultimate destination and beyond a certain port. REG: *v.* KHOO SIM CHOON - - - - - - - 97
2. ——Where a person is charged with breach of the Post Office Act XIV. of 1866, in performing postal services other than through the Post Office,—it is for him to

POST OFFICE—*continued.*

shew that he comes within the exception in section 5, and not for the prosecutor to shew that he does not. REG. *v.* TAN A YEAP & ORS. - - - - - - 104

POSTPONEMENT—Absence of Counsel no ground for,—of case - - - 50

see COUNSEL.

PREVIOUS CASE—Notes of Evidence - - - - - - - 102

see EVIDENCE. 6.

see also MAGISTRATE. 17. - 138

PRISONER—It is irregular and improper for a Magistrate to give a prisoner the option to be tried summarily or be committed to the Assizes; or any option in any criminal matter at all - - - 182

see MAGISTRATE. 20.

PROSECUTOR—A prosecutor in a proceeding before a Magistrate, who is dissatisfied with the decision of the Magistrate may, under section 25 of the Appeals Ordinance 9 of 1874, appeal in the same way as a prisoner might. Where the Magistrate had decided a case on the evidence as one of simple assault, and the prosecutor was dissatisfied therewith, and contended that the evidence disclosed an assault with intent to murder, the Court refused to disturb the Magistrate's decision. TOWERS *v.* MUSTAN & ORS. - - - - - 92

2. ——Production of books of,—as evidence for the defence—Search Warrant refused - - - - - - - 107

see SEARCH WARRANT.

3. ——Doing of an act without a license —onus probandi on prosecution - 140

see CONSERVANCY. 3.

see also PAWNBROKER. 1.

PUBLIC LOTTERY—*see* Lottery.

PUBLIC OFFICER—*see* Receiving Gratification - - - - - - - 114

see also JURISDICTION. 5. 116

see also MAGISTRATE. 20.

QUARTER SESSIONS—Origin and Constitution of Court of,—considered - 110

see APPEAL. 5.

RECEIVING GRATIFICATION—No conviction can be had for receiving a gratification under section 161 of the Penal Code, unless it be received for doing what would be a strictly official act. The appellant, an apothecary, came to this Colony under a contract with the Indian Government, that he was required to do only Hospital duties, and was not to be restricted from private practice. On his arrival here, he was placed in charge of a Hospital in Province Wellesley. Not long after, a patient was admitted into the hospital suffering from wounds received in a fight, and his friends applied to the appellant for a certificate of the wounded man's condition, in order to procure a warrant for the apprehension of the assailants. The general practice of the apothecaries in the Settlement was to grant such certificates without remuneration, and the Medical Officer considered it was the duty of the appellant to have granted the certificate without charge. There was no other evidence of its being an official act. The appellant declined to grant the certificate unless he was paid, as he considered it no part of his duty to give it, whereupon he was paid $5, and then granted the certificate. The Magistrate convicted him under section 161,—*Held*, the conviction could not be sustained. CONNOR *v.* TAN JIM SIN - - - - - - - - - 114

see also JURISDICTION. 5. 116

——MAGISTRATE. 20. - 182

RECORD OF CONVICTION—The doubtful meaning of a Regulation or Act, or the inability to reconcile two apparently contradictory clauses, or uncertainty as to whether the alleged infringement is of any one or more particular sections, does not excuse a Magistrate from stating in the record of conviction, the particular clause or section of the Regulation or Act alleged to be infringed. A conviction for "infringing the Opium Regulation" is uncertain and bad, and will, on appeal, be quashed. General observations on duties of Justices of the Peace and the construction of their convictions. LIM BEH *v.* OPIUM FARMER 10

REDEMPTION OF MORTGAGE—Interest—Mortgagee - - - - - 133

see MORTGAGE. 1.

REQUESTS, COURT OF—*see* Court of Requests.

REVENUE CASE—Magistrate not legally justified in allowing prosecution of,—to be withdrawn - - - - - - - 6

see WITNESS.

RIGHT—Appeal—Crown—Magistrate—Locus standi - - - - - - 144

see APPEAL. 7.

——Claim of,—to property—*see* Claim to Property.

RIOTING—The appellants, some members of the red, and others, of the white flag Society, were convicted by the Magistrate, of rioting, under section 147 of the Penal Code. From the evidence, it appeared that the appellants, as members of the respective Kongsees, were having a free fight amongst themselves,—*Held*, the conviction could not be sustained, inasmuch as the appellants

RIOTING—*continued.*
had not a common object. REG. *v.* ABDULRAHMAN & ORS. - - - - - 61
see also UNLAWFUL ASSEMBLY.
ROBBERY—Assault and,—*see* Assault. 50
SEAL—Conviction without Magistrate's seal of office—defect only formal - 136
see MAGISTRATE. 16.
SEARCH WARRANT—A search warrant will not be issued for the production of the private books of a prosecutor, in order to be evidence for the defence,—*Query.* Is an appeal from a Magistrate's decision, an "enquiry" within Sec. 25 of Ord. 20 of 1870? KHOO TEAN TEK *v.* OPIUM FARMER - - - - - - - - - 107
SECRET SOCIETY—*see* Rioting. 61
see also Unlawful Assembly - - 170
SEIZURE OF SHIP—*see* Chandoo. 5. 176
SHIP—Offence committed on board foreign, —*see* Jurisdiction. 7. - - - - 152
———Seizure of—*see* CHANDOO. 5. 176
SLAUGHTER-HOUSE—License—right to keep pigs - - - - - - 140
see CONSERVANCY. 3.
SMALLNESS OF FINE—*see* Magistrate. 11. - - - - - - 108
STATUTE OF LIMITATIONS—*see* Court of Requests. 1 - - - - - 1
STATUTES:
4 Geo. IV. c. 34 - - - 16
see LABOUR 1.
12 & 13 Vict., c. 96, s. 1 - - 152
see JURISDICTION. 7.
24 & 25 Vict., c. 96 - - - 50
see ASSAULT.
———The Statute Law of England, and the English Statutes declaring certain games illegal, do not extend to this Colony - - - - - - - - 94
see GAMBLING. 2.
STREET—Pigs—License - - 140
see CONSERVANCY. 3.
SUMMONS—Where a person applies to a Magistrate for a summons, and the information discloses an offence, the Magistrate has no option in granting or refusing the summons; but is bound to issue it. ABDUL GUNNY *v.* NEWLAND - - - 102
SURVEY—Expenses of,—Land in dispute - - - - - - - - 158
see LANDMARKS.
THEFT—A conviction for theft or cheating must shew that the property stolen or cheated, is the property of some person, so as to be certain and not vague. The objection is not one of form,—*Semble.* The Ordinance 5 of 1870, does not apply to proceedings or convictions by Magistrates. VERAMAH *v.* THAIVOO - - - 117
2. ——The appellants were convicted of theft of Government timber. The evidence
THEFT—*continued.*
that the timber was cut in British Territory was very unsatisfactory,—*Held,* the conviction could not be sustained. Even if the trees were felled in British Territory, yet, as there was nothing to shew that the appellants knew they were trespassing, the conviction could not be sustained, as no *animus furandi* could, under the circumstances, reasonably be implied. REG. *v.* LIM A SI & ANOR. - - - - - 143
TITLE—Assertion of,—to property—Insult - - - - - - - - - 167
see CLAIM TO PROPERTY. 3.
TRESPASS—The act of a person in going into the house of another, with intent to have criminal intercourse with the latter's wife, although necessarily resulting in annoyance, or as an insult to the latter, is not an offence within sections 441 & 442 of the Penal Code. ABBASS *v.* TOMBY - 131
see also CRIMINAL TRESPASS. 1. 110
——— THEFT. 2. - - 143
TRUST—Breach of,—*see* Breach of Trust - - - - - - - - 104
see also PARTNERSHIP. - 79
TWO OFFENCES—Conviction for,—one penalty awarded - - - - 119
see NOTICE OF APPEAL.
see also CONVICTION. 14. - 151
UNLAWFUL ASSEMBLY—Where prisoners were convicted of being members of an unlawful assembly under section 144 of the Penal Code, but the evidence shewed that they were having a fight among themselves,—*Held,* they had no common object, and the conviction was set aside, and the case remitted to the Magistrate for rehearing on a fresh charge for assault or such other offence,—*Semble.* It is inconsistent, and open to serious objection that a person who is Assistant Superintendent of Police and receives reports of cases as such, should act as Magistrate and afterwards try the same cases. REG. *v.* CHENG HEE - 89
2. ——The appellants were members of a secret society, and were found standing in front of the Society or Kongsee House, in which apparently several others were assembled. They, in company with the others, fled on the approach of the Police, who visited the said house in consequence of information that the members of that society were gathering there, with the view of attacking another society. The appellants were however arrested by the Police, and in the Kongsee House were found a great number of clubs or poles, apparently intended as weapons of offence: some of these were thrown about the house, while others, in bundles, were hidden,—*Held,* [quashing the adjudication of the Magistrate who convicted the appellants of being members of an unlawful assembly, under

UNLAWFUL ASSEMBLY—*continued.*
section 149 of the Penal Code], that there was no reasonable evidence that the appellants formed part of the assembly, or had any common object of committing a breach of the peace. The word "assembly" in section 149, has the ordinary meaning of the word, and means a meeting of persons in the same place, so as to be able to communicate freely with each other. REG. *v.* KHOO SEE HEE & ORS. - - - 170
see also KUNDURI - - 118

VAGRANCY—Before a conviction can be had under section 32 of Ordinance 13 of 1872, for being "found wandering about without being able to give any satisfactory account of oneself," the prosecution must shew that all, and not one or more only of the conditions mentioned in the section, existed. REG. *v.* BEN HOOIE & ANOR. 103

WARRANT—Recall of,—by Magistrate - - - - - - 51
see JURISDICTION. 2.
see also SEARCH WARRANT. 107

WIFE—*see* TRESPASS - - - 131

WITNESS—It is no ground for excluding the testimony of a witness that he has been present in Court, and heard the evidence given by other witnesses: such a fact goes merely to the credibility of his evidence, but not to its admissibility. A Magistrate is not legally justified in allowing a prosecution for breach of the Revenue Regulations to be withdrawn, since the offence is not of a private nature. A Magistrate has power, after hearing out a case, to adjourn same to consider his decision. Where the information and summons against the appellant charged with an offence under Section 11 of the Revenue Regulations of 1830,—*Held*, a conviction for an offence under Section 5 of such Regulations—with which he was not charged, nor informed of,—could not be sustained. EDWARDS *v.* EAST INDIA CO. - - - - - 6

2.——Irregularity—Evidence. - 98
see IRREGULARITY.
see also EVIDENCE. 2. - 79

WOMAN—*see* MARRIED WOMAN. 2. 126

WORDS—"Any person" - - 152
see JURISDICTION. 7.

WORDS—*continued.*
——— "Assembly" - - - - 118
see UNLAWFUL ASSEMBLY. 2.
——— "British India" - - *99*
see LABOUR. 4.
——— "Carrying on the trade of a Pawnbroker" - - - - - 148
see PAWNBROKER. 2.
——— "Common Gaming House" 94
see GAMBLING. 2.
——— "Debt, duty or matter in dispute" - - - - - - - 1
see COURT OF REQUESTS. 1.
——— "Enquiry" - - - - 107
see SEARCH WARRANT.
——— "Feloniously" - - - 50
see ASSAULT.
——— "Found wandering about without being able to give any satisfactory account of oneself" - - - 103
see VAGRANCY.
——— "Frivolous" - - - *120*
see MAGISTRATE. 12.
——— "Grievous Hurt" - - 99
see GRIEVOUS HURT.
——— "In or near any street" - 140
see CONSERVANCY. 3.
——— "Intimidate, insult or annoy, or to commit an offence" - - - 101
see CRIMINAL TRESPASS. 1.
——— "Knowingly being in possession of illicit chandoo" - - - - 132
see CHANDOO. 2.
——— "Lawful and reasonable excuse" - - - - - - - 71
see LABOUR. 3.
——— "Misappropriates or Converts" - - - - - - - 86
see MOVEABLE PROPERTY.
——— "Mischief" - - - 88
see MISCHIEF. 1.
——— "Moveable property" - 86
see MOVEABLE PROPERTY.
——— "Occupier" - - - 171
see GAMBLING. 5.
——— "Place" - - - - 67
see LOTTERY.
——— "Possession" - - 100, 132
see CHANDOO. 1, 2.
——— "Street" - - - - *140*
see CONSERVANCY. 3.
——— "Wheresoever committed" 152
see JURISDICTION. 7.

PRINTED AT THE "SINGAPORE AND STRAITS PRINTING OFFICE."